No. 14197

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

CONSOLIDATED FOODS CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition to Review and Set Aside Order of the Federal Trade Commission

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14197

CONSOLIDATED FOODS CORPORATION,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

JOINT APPENDIX

SUMMARY STATEMENT OF PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION

Complaint, Motion To Dismiss and Answer

This proceeding was initiated by a complaint issued by the Federal Trade Commission on December 18, 1957. (App. p. 5*) The complaint was served on Consolidated Foods Corporation (petitioner in this proceeding, herein called "Consolidated") on January 8, 1958. The complaint charged that Consolidated had violated Section 7 of the Clayton Act (15 U.S.C. § 18) by acquiring the business and assets of Gentry, Inc. on April 12, 1951. By order dated December 18, 1957, Honorable Earl J. Kolb was designated as the Hearing Examiner.

* Reference is thus made to the page of this appendix where the key pleadings, orders and opinions are reproduced.

Prior to answering, Consolidated filed with the Hearing Examiner a motion to dismiss the complaint and a motion for leave to brief and argue the motion to dismiss. Both motions were denied by the Hearing Examiner (App. pp. 8, 13) and on April 7, 1958, Consolidated filed its answer denying the material allegations of the complaint. (App. p. 9) Meanwhile, Consolidated filed with the Commission an interlocutory appeal from the order of the Hearing Examiner with respect to the motion to dismiss. On April 25, 1958, the Commission denied the appeal and the motion to dismiss, without prejudice to Consolidated's right to renew the motion after introduction of all evidence. (App. p. 14)

Hearings for Reception of the Commission's Case

Evidence introduced by counsel supporting the complaint was received at hearings held at the following places and times:

Chicago, Illinois	April 29-30, 1958
Los Angeles, California	October 14-16, 1958
San Francisco, California	October 20-21, 1958
Chicago, Illinois	June 15-17, 1959
Washington, D. C.	August 10, 1959

Consolidated's Motion To Dismiss for Failure To Prove a Prima Facie Case

At the conclusion of the Commission's case, Consolidated moved to dismiss the action for failure to prove a prima facie case of violation of Section 7 of the Clayton Act. On December 11, 1959, the Hearing Examiner denied this motion. (App. p. 15) Consolidated thereupon filed an interlocutory appeal which was fully briefed by both sides. On March 4, 1960, the Commission denied the appeal. (App. p. 16) The Commission's denial of the appeal was accom-

panied by an opinion of Commissioner Kern, with Chairman Kintner and Commissioner Tait filing a separate opinion in which they concurred in the result only.

Hearings for Reception of Consolidated's Case and Rebuttal

Evidence introduced by Consolidated's counsel was received at hearings held at the following places and times:

New York, New York	August 22-27, 1960
Los Angeles, California	October 18-21, 1960
San Francisco, California	October 24-27, 1960
Washington, D. C.	February 2, 1961
Chicago, Illinois	February 20-24, 1961
Chicago, Illinois	March 6-10, 1961

Counsel supporting the complaint introduced rebuttal evidence at a hearing held in Washington, D. C. on May 8, 1961. On December 28, 1961, the Hearing Examiner ordered that all proceedings in the case were closed. (App. p. 29)

Decisions of the Hearing Examiner and the Commission

After submission of proposed findings of fact and briefs by both parties, the Hearing Examiner filed his Initial Decision on December 29, 1961. (App. p. 30) In his decision, the Hearing Examiner concluded that, by its acquisition of Gentry, Consolidated had violated Section 7 of the Clayton Act and ordered Consolidated to divest itself of the business and assets of Gentry.

On January 17, 1962 Consolidated filed with the Commission a notice of intention to appeal from the Hearing Examiner's Initial Decision. After briefing and oral argument, the Commission issued on November 15, 1962 its find-

ings of fact, conclusions of law and order, together with an accompanying opinion. (App. p. 51) The Commission adopted certain of the Hearing Examiner's findings of fact and made others of its own. With Commissioner Anderson dissenting and Commissioner Higginbotham not participating, the Commission determined that Consolidated had violated Section 7 of the Clayton Act and issued an order providing for the submission of proposals for a final order of divestiture by Consolidated of the business and assets of Gentry. Thereafter, counsel submitted proposed forms of order to carry out the Commission's decision. On March 22, 1963 the Commission issued its final order of divestiture with an accompanying memorandum. (App. p. 78)

Consolidated's Petition for Review

On May 29, 1963 Consolidated filed with the United States Court of Appeals for the Seventh Circuit its petition for review of the final order of the Commission. (App. p. 86)

PROCEEDINGS BEFORE FEDERAL TRADE COMMISSION

2 [Caption Omitted]

COMPLAINT

(Issued on December 18, 1957; served on January 8, 1958)

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described has violated and is now violating the provisions of Section 7 of the Clayton Act (15 U.S.C., Title 15, Section 18), as amended and approved December 29, 1950, hereby issues its complaint charging as follows:

PARAGRAPH ONE: Respondent Consolidated Foods Corporation is a corporation organized in 1941 and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 135 South La Salle Street, Chicago, Illinois.

Respondent Consolidated Foods Corporation, hereinafter referred to as Consolidated, is engaged, among other things in the business of processing, distributing, and retailing a broad line of food products. Its food operations are completely integrated in that it handles a wide variety of products from the raw stage in the field to retailing to the ultimate consumer.

During the period from July 1, 1950, to June 30, 1951, Consolidated's net sales were $174,006,801. Its net sales for the period from July 1, 1955, to June 30, 1956, totaled $268,252,695. As of June 30, 1951, Consolidated's assets totaled approximately $60,000,000 and by June 30, 1956 its total assets increased to more than $99,000,000.

The distribution of food products constitutes a principal part of Consolidated's operations. In connection with this distribution Consolidated purchases a substantial volume

of food products from various suppliers, many of which use, or can use, the type of dried food seasonings produced by Consolidated's Gentry Division.

3 Prior to and since April 12, 1951, Consolidated has been and is now engaged in the purchasing, processing and distribution of food products. Consolidated purchases, processes, and distributes such products in commerce, as "commerce" is defined in the Clayton Act and offers to sell, sells, and distributes said products in said commerce in several of the States of the United States to purchasers located in several of the States of the United States.

PARAGRAPH TWO: Gentry, Incorporated, prior to April 1951, was a corporation organized in 1946 and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 837 North Spring Street, Los Angeles, California. Gentry, Incorporated, hereinafter referred to as Gentry was engaged in the business of manufacturing dried food seasonings including, among others, onions, garlic, chili pepper and paprika.*

Gentry, prior to April 1951, in the regular course and conduct of its business, sold or offered for sale, and distributed products hereinabove described, in commerce as "commerce" is defined in the Clayton Act.

PARAGRAPH THREE: On or about April 12, 1951, the stockholders of Gentry approved the sale of Gentry to Consolidated. In accordance with this approval Consolidated acquired Gentry by exchanging one share of Consolidated stock for each five shares of Gentry stock.*

Since its acquisition by Consolidated, Gentry has been

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* On the motion of counsel supporting the complaint, this subparagraph was amended to conform to the evidence. The sentence beginning "In accordance with" was deleted and the following sentence was substituted for it: "In accordance with this approval Consolidated acquired the business and assets of Gentry." (Tr. 3577)

operated as a division of Consolidated. Gentry's net sales for 1950 were $2,629,910. For the period from July 1, 1954, to June 30, 1955, net sales for the Gentry Division amounted to $5,061,989.

Prior to and at the time of the acquisition Gentry was one of the few firms of consequence and occupied a position of dominance in the onion and garlic dehydrating and processing industry. Subsequent to the acquisition the Gentry Division of Consolidated has maintained and now maintains a position of dominance in said industry.

PARAGRAPH FOUR: The effect of the aforesaid acquisition by Consolidated of Gentry may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce, as "commerce" is defined in the Clayton Act, in which Gentry was engaged and in which Consolidated's Gentry Division is now engaged.

4 More specifically the aforesaid effects include, among others, the actual or potential lessening of competition or a tendency to create a monopoly in that the acquisition of Gentry by Consolidated:

1. May substantially lessen competition in the nation as a whole or in various sections of the country by reason of the utilization of Consolidated's purchasing power in such a manner as to coerce or attempt to coerce food suppliers to purchase dried food seasonings from its Gentry Division by withdrawing or threatening to withdraw its patronage.

2. May substantially lessen competition or tend to create a monopoly in the nation as a whole or in various sections of the country by the increase of the dominant position of Consolidated's Gentry Division in the dried food seasonings industry resulting from the utilization of Consolidated's purchasing power in such a manner as to coerce or attempt to coerce food suppliers to purchase dried food seasonings from its Gentry Division by withdrawing or threatening to withdraw its patronage.

PARAGRAPH FIVE: The foregoing acquisition, acts

and practices of respondent Consolidated, as herein alleged constitute a violation of Section 7 of the Clayton Act. (U.S.C. Title 15, Sec. 18), as amended and approved December 29, 1950.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 18th day of December, A.D., 1957, issues its complaint against said respondent.

18 [Caption Omitted]

ORDER OF HEARING EXAMINER DENYING CONSOLIDATED'S MOTION FOR LEAVE TO FILE MEMORANDUM AND PRESENT ORAL ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(Issued on April 2, 1958)

This proceeding is before the hearing examiner upon motion of respondent for leave to file memorandum and present oral argument in support of motion to dismiss and for postponement of hearing date.

The complaint in this proceeding was issued by the Commission on December 18, 1957, fixing the date of initial hearing as February 27, 1958. On January 27, 1958, on motion of respondent, time to file answer to the complaint was extended to March 10, 1958, and the initial hearing cancelled and reset for March 31, 1958. On February 12, 1958, date of initial hearing was further extended to April 10, 1958. On March 5, 1958, upon request of attorney for respondent, the time to file answer was again extended to and including April 10, 1958, and the initial hearing reset for April 29, 1958.

In the present motion it appears that respondent proposes to file a motion to dismiss the complaint on or before April 10, 1958, the date set for the filing of an answer in this proceeding. It appears from the present motion that the motion to dismiss to be filed by the respondent will raise the question of the propriety of the issuance of the com-

plaint in the first instance by the Commission and also whether or not such complaint states a cause of action under Section 7 of the Clayton Act. If this be correct,
19 the hearing examiner would be asked to act in a reviewing capacity to determine whether or not a complaint issued by the Federal Trade Commission is sufficient or should have been issued in the first instance. In the absence of testimony and other evidence which might have a factual bearing on the sufficiency of the cause of action, the hearing examiner is without authority to review the complaint of the Commission to determine its legal sufficiency or the propriety of its issuance. In view of this, it is the opinion of this hearing examiner that he would not be in a position to entertain the motion which the respondent proposes to file and consequently there is no occasion for granting leave to file memorandum or to present oral argument in support of said motion.

IT IS THEREFORE ORDERED that motion of respondent for leave to file on or before May 10, 1958, a memorandum in support of the motion to dismiss the complaint which will be filed by respondent on or before April 10, 1958, be, and the same is hereby, denied.

IT IS FURTHER ORDERED that motion for leave to argue said proposed motion orally before the hearing examiner be, and the same is hereby, denied.

IT IS FURTHER ORDERED that motion for postponement of the initial hearing now set for April 29, 1958, be, and the same is hereby, denied, and that hearings proceed as scheduled.

20 [Caption Omitted]

ANSWER

(Filed on April 7, 1958)

Respondent, answering the Complaint herein, alleges:

PARAGRAPH ONE: The allegations of Paragraph One are admitted, except as follows:

(a) Respondent denies the conclusory allegations that its food operations are completely integrated in that it handles a wide variety of products from the raw stage in the field to retailing to the ultimate consumers.

(b) Respondent alleges that portions of the alleged processing, distributing and retailing of food products are not done by Consolidated but by subsidiary corporations.

21 (c) Respondent is without knowledge sufficient to form a belief as to the truth of the allegation that many of its suppliers use or can use the type of dried food seasonings produced by its Gentry Division, but admits that this allegation is true as to some of its suppliers.

(d) Respondent alleges that prior to and since April 12, 1951, not all of its products are purchased, processed and distributed by it in commerce as "commerce" is defined in the Clayton Act.

PARAGRAPH TWO: The allegations of Paragraph Two are admitted except that respondent alleges that not all the products sold, offered for sale and distributed by Gentry, Incorporated (herein called "Gentry") were sold, offered for sale and distributed in commerce as "commerce" is defined in the Clayton Act.

PARAGRAPH THREE: Respondent admits the allegations of Paragraph Three except as follows:

(a) Respondent alleges that it acquired the assets of Gentry in exchange for stock of Consolidated which was subsequently distributed in liquidation of Gentry to the latter's shareholders.

22 (b) Respondent is without knowledge sufficient to form a belief as to the truth of the third subparagraph of Paragraph Three.

PARAGRAPH FOUR: Respondent denies the allegations of Paragraph Four.

PARAGRAPH FIVE: Respondent denies the allegations of Paragraph Five.

FURTHER ANSWERING, respondent alleges that the

Complaint fails to allege acts or practices in violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) for the following reasons:

1. Prior to the acquisition of the assets of Gentry by Consolidated, neither Consolidated nor its subsidiaries ever manufactured or sold dried food seasonings competitive with those manufactured and sold by Gentry. The acquisition did not, therefore, result in any "horizontal" integration of competing companies. There was no elimination of any competition whatever between the acquiring and the acquired corporation.

2. Prior to the acquisition of Gentry by Consolidated, the aggregate purchases of dried food seasonings by the latter and its subsidiaries from Gentry and its competitors were entirely insignificant in amount. There was, there-
23 fore, in the acquisition of Gentry by Consolidated no foreclosure of any significant market for Gentry's competitors and no "vertical" integration having any substantial effect upon competition.

3. Section 7 of the Clayton Act provides that an acquisition is unlawful only where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The statute requires a casual relationship between the acquisition and a lessening of competition or tendency toward monopoly. Since the acquisition of Gentry by Consolidated did not result in either horizontal or vertical integration, the acquisition could not be the cause of any substantial lessening of competition or tendency to create a monopoly. Therefore, the alleged acquisition cannot have violated Section 7.

4. The only specific act or practice alleged in the Complaint aside from the acquisition itself is an alleged coercion or attempted coercion of Consolidated's food suppliers to purchase dried food seasonings from Gentry. Such alleged actions do not result from the acquisition itself and the casual relationship required by Section 7 of the

Clayton Act is thus not present. The alleged coercion, if it is a violation of the federal anti-trust laws, may and should be reached under Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45).

FURTHER ANSWERING, respondent alleges that the Complaint was not timely issued as required by law for the following reasons:

5. Since the only act alleged at which Section 7 is directed—the acquisition of Gentry by Consolidated—was fully consummated on April 12, 1951, the Federal Trade Commission having had full knowledge in 1951 of the acquisition and the facts relating thereto was required to proceed at that time or reasonably soon thereafter. Having delayed until December 18, 1957, to issue its Complaint, the Federal Trade Commission should be barred from proceeding with this action.

6. Section 11 of the Clayton Act (U.S.C. Title 15, Sec. 21) gives the Federal Trade Commission authority to "enforce compliance" with Section 7 by issuing a complaint when it has reason to believe that a violation has occurred or is occurring. Since the only violation here alleged occurred in 1951, and since the Federal Trade Commission was advised of all facts surrounding the acquisition at that time and did not issue any complaint pursuant to Section 11 within a reasonable time thereafter, it has failed to comply with Section 11 and the Complaint should therefore be dismissed.

7. The act allegedly forbidden in this Complaint—the acquisition of the assets of Gentry—was either unlawfully consummated in 1951 or else it does not come within the statute. The acquisition here in question was of the assets of Gentry, not its stock, so that there has never been any holding of Gentry's stock by Consolidated. There is thus in this proceeding, which involves an assets acquisition, no basis for a contention that there can be a "continuing" violation of Section 7 through stock owner-

ship or that this acquisition may have been lawful at the time of consummation but later became unlawful solely because of events occurring thereafter.

FURTHER ANSWERING, respondent asserts that the Complaint does not state any cause of action against respondent.

WHEREFORE, respondent asserts that there is no basis for any cease and desist or divestiture order or any other relief against respondent. Respondent prays that the Federal Trade Commission find that there is and has been no violation by respondent of Section 7 of the Clayton Act (U. S. C. Title 15, Sec. 18), and that the Complaint and this proceeding be dismissed.

59 [Caption Omitted]

ORDER OF HEARING EXAMINER DENYING CONSOLIDATED'S MOTION TO DISMISS THE COMPLAINT

(Issued on April 9, 1958)

This proceeding is before the hearing examiner upon motion of respondent to dismiss the complaint filed herein.

It appears from the motion to dismiss that it is the contention of the respondent that the complaint herein fails to set out a cause of action under Section 7 of the Clayton Act and that its issuance has not been timely.

By this motion the respondent is asking the hearing examiner to act in a reviewing capacity to determine whether or not the complaint issued by the Federal Trade Commission is sufficient or should have been issued in the first instance.

It is the opinion of the hearing examiner that upon the present state of the record he is without authority to review the complaint of the Commission or the propriety of its issuance.

IT IS THEREFORE ORDERED that respondent's motion to dismiss the complaint herein be, and the same is hereby, denied.

65 [Caption Omitted]

ORDER OF FEDERAL TRADE COMMISSION DENYING CONSOLIDATED'S INTERLOCUTORY APPEAL AND MOTION TO DISMISS COMPLAINT

(Issued on April 25, 1958)

This matter having come on to be heard upon the respondent's appeal from the hearing examiner's order of April 2, 1958, denying the respondent's motion for leave to file on or before May 10, 1958, a memorandum in support of a proposed motion to dismiss the complaint and to argue said motion orally, and for postponement of a hearing theretofore set for April 29, 1958, to a date to be fixed after final decision on the motion to dismiss; and

It appearing that the basis for the hearing examiner's order was that he would have no authority to rule on the questions to be raised in the proposed motion to dismiss, namely, the propriety and timeliness of the Commission's action in issuing the complaint in the first instance and the sufficiency of the complaint as issued to state a cause of action under Section 7 of the Clayton Act, as amended; and

It further appearing that the respondent has made no showing that the hearing examiner was in error in so ruling, and, thus, has failed to demonstrate that the order is or may be one to be entertained under § 3.20 of the Commission's Rules of Practice; and

The Commission, however, having considered the respondent's motion to dismiss the complaint, filed
66 April 7, 1958, and having determined that the issues presented therein can best be resolved after the development of a complete factual record:

IT IS ORDERED that the respondent's appeal from the hearing examiner's order of April 2, 1958, be, and it hereby is, denied.

IT IS FURTHER ORDERED that the respondent's motion to dismiss the complaint be, and it hereby is, also denied, without prejudice, however, to the right of the respondent to renew said motion after introduction of all of the evidence in the case.

By the Commission.

366 [Caption Omitted]

ORDER OF HEARING EXAMINER DENYING CONSOLIDATED'S MOTION TO DISMISS AT CONCLUSION OF GOVERNMENT'S CASE

(Issued on December 11, 1959)

This proceeding is before the hearing examiner upon motion of respondent to dismiss this action for failure to prove a prima facie case of violation of Section 7 of the Clayton Act as alleged by the complaint; answer thereto filed by counsel supporting the complaint; and reply filed by respondent.

The hearing examiner has given consideration to the motion of respondent, answer thereto, reply, and the record herein, and is of the opinion that dehydrated onion and dehydrated garlic comprise the lines of commerce involved in this proceeding and that there is reasonable, probative and substantial evidence in the record which, when considered in connection with reasonable inferences which may be drawn therefrom, would support an order in the absence of rebutting testimony.[1]

IT IS THEREFORE ORDERED that motion of respondent to dismiss this proceeding be, and the same is hereby, denied.

---

1. Vulcanized Rubber and Plastics Company, D. 6222, 52 F.T.C. 533; The Timken Roller Bearing Company, D. 6504; Scott Paper Company, D. 6559.

391 [Caption Omitted]

ORDER OF FEDERAL TRADE COMMISSION DENYING INTERLOCUTORY APPEAL FROM DENIAL OF CONSOLIDATED'S MOTION TO DISMISS

(Issued on March 4, 1960)

The respondent having filed an interlocutory appeal from the hearing examiner's order denying its motion to dismiss the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the appeal is not one to be granted under the provisions of § 3.20 of the Rules of Practice:

IT IS ORDERED that said appeal be, and it hereby is, denied.

By the Commission, Chairman Kintner and Commissioner Tait concurring in the result.

392 [Caption Omitted]

OPINION OF THE FEDERAL TRADE COMMISSION ACCOMPANYING ORDER DENYING APPEAL FROM DENIAL OF CONSOLIDATED'S MOTION TO DISMISS

(Issued on March 4, 1960)

By Kern Commissioner:

The complaint in this matter, issued December 18, 1957, charges the respondent with having violated Section 7 of the Clayton Act, as amended. At the conclusion of the case in chief, the respondent filed a motion seeking dismissal of the proceeding on the ground that the proof thus far adduced fails to establish a *prima facie* case. Briefs in support of and in opposition to the motion were filed, and on December 11, 1959, the hearing examiner entered an order denying the motion. The case is here on the respondent's interlocutory appeal from that order.

In his order denying the motion, the hearing examiner in pertinent part stated:

> "The hearing examiner has given consideration to the motion of respondent, answer thereto, reply, and the record herein, and is of the opinion that dehydrated onion and dehydrated garlic comprise the lines of commerce involved in this proceeding and that there is reasonable, probative and substantial evidence in the record which, when considered in connection with reasonable inferences which may be drawn therefrom,
393 would support an order in the absence of rebutting testimony.[1]
>
> "IT IS THEREFORE ORDERED that motion of respondent to dismiss this proceeding be, and the same is hereby, dismissed."

"1. Vulcanized Rubber and Plastics Company, D. 6222, 52 F.T.C. 533; The Timkin Roller Bearing Company, D. 6504; Scott Paper Company, D. 6559."

The respondent concedes that the test applied by the hearing examiner in finding a *prima facie* case represents the established view of the Commission, but contends that the use of such test is not in conformity with the rule now followed by the Federal district courts in ruling on motions to dismiss actions tried by the court without a jury. It contends also that the hearing examiner has prematurely delineated the lines of commerce to be considered in the proceeding, thereby apparently precluding the respondent from proving as part of its case that the relevant market must include both raw and dehydrated onion and garlic.

As pointed out by the respondent, the standard applied in Commission proceedings in the disposition of motions to dismiss for failure of the evidence to establish a *prima facie* case was first articulated in 1955 in the matter of *Vulcanized Rubber and Plastics Company*, Docket 6222, 52 F.T.C. 533.

Like the motion here, the motion in that case was made at the conclusion of the case in chief and was based on the ground that a *prima facie* case had not been established. As in this case, also, the questions for determination were, first, whether, under the provisions of § 3.20 of the Commission's Rules of Practice, the interlocutory appeal fell within that category of appeals which the Commission would consider on the merits, and, second, if so, whether the ruling appealed from was erroneous. The second question was never reached, and no decision was made thereon, for, as the opinion shows, the appeal was not one to be considered on the merits. And this was so, the Commission explained, because the ruling appealed from constituted

394 only a determination that there was then in the record sufficient evidence to justify the requirement that the respondent proceed with its defense, which determina-

tion could have no material effect on the final decision of the case within the meaning of § 3.20. The Commission, among other things, stated:

> "It is also clear that for the Commission to entertain appeals of this nature would be but to encourage the submission of cases for decision piecemeal, with resulting unjustifiable delays; and that, in the opinion of the Commission, would not 'better serve the interests of justice.'"

Thus, while the Commission in *Vulcanized Rubber* did express approval of a standard to be applied in determining whether a *prima facie* case has been established, the point decided was that under the applicable rules of practice an interlocutory appeal will be considered only if it is shown that the ruling appealed from will in some manner affect the final decision of the case or that for some other reason substantial rights of the parties are involved. This is still the Commission's policy. Under this policy it is incumbent on the party appealing from a ruling denying a motion to dismiss initially to show the existence of such circumstances. This has not been done in this case, and it follows that the ruling here, like the ruling in *Vulcanized Rubber*, is not subject to interlocutory appeal.

In view of the foregoing, it is not necessary to dwell at length on the respondent's contention that a hearing examiner, when confronted with a motion to dismiss a Commission proceeding for failure of proof at the close of the case in chief, should in all instances weigh the evidence, including all possible inferences, both pro and con, with the same finality as would be required in an ultimate decision on the merits. We do note, however, that this is not the first time this suggestion has been made. Moreover, it may be that the test applied by the Commission is not well understood, and for the benefit of all concerned we shall briefly explain it.

In attacking the Commission's test, the respondent, assuming apparently that this is the basis and reason for it, quotes from the opinion in *Vulcanized Rubber* as follows:

395 "A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a non-jury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint."

And this, it says, is not a correct statement of the rule now followed in the Federal district courts. The Commission is aware of the fact that the courts of appeals in a number of circuits in recent years have not so stated the test. One of the leading cases on the point is *Allred* v. *Sasser,* 170 F.2d 233 (7th Cir. 1948), in which the court said:

> "The trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive." (170 F.2d at 235.)

Substantially, the same test has been stated by the Courts of Appeals for the Second, Fifth and Sixth Circuits.[1]

It is to be noted, however, that all these cases have involved appeals from judgments on *the merits against the plaintiffs,* resulting in final disposition of the cases. And under Rule 41(b) of the Rules of Civil Procedure (as amended, effective March 19, 1948), the requirement in such a situation is that the district court as trier of the facts

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1. See *Huber* v. *American President Lines,* 240 F.2d 778 (2d Cir. 1957); *Benton* v. *Blair,* 228 F.2d 55 (5th Cir. 1956); *Bach* v. *Friden Calculating Machine Co., Inc.,* 148 F.2d 407 (6th Cir. 1945).

shall make findings as provided in Rule 52(b). This, also, is the procedure in the same circumstances in a Commission proceeding. (See §§ 3.8(e) and 3.21 of the Commission's Rules of Practice, under which if a motion to dismiss a complaint is granted with the result that a proceeding is terminated, the hearing examiner must make and file an initial decision containing a statement of findings and conclusions upon all the material issues of fact, law or discretion, based upon a consideration of the whole record, and an ap-
396 propriate order.) Rule 41(b) further provides, however, that in an action tried by the court without a jury the court when presented with a motion to dismiss on the ground that the plaintiff has shown no right to relief may *decline to render any judgment* until the close of all the evidence, and if that course is followed there is no requirement for the court to make any findings at all.

The Commission, on the other hand, *has no rule* authorizing its hearing examiners to withhold decision on a motion to dismiss a complaint. Presumably, if it did have, the motion could be denied solely as a matter of sound discretion and the question of weighing the evidence, as such, would not arise. The Commission feels, however, that if at the conclusion of the evidence in support of the complaint it appears reasonably certain that the respondent has not violated the law, the complaint against it should be immediately dismissed. In all other cases, the public interest requires the development of a full record on the basis of which all questions of law, fact and discretion may be considered and decided in the light of all the circumstances. Thus, the disposition of a motion to dismiss may involve a single step, that of denial because of the presence of sufficient evidence to justify the requirement that the respondent present its defense, or two steps, a determination that such evidence is not present and, in addition, a detailed consideration of the record, including all infer-

ences to be drawn therefrom, and the preparation of an appropriate initial decision. A respondent filing a motion to dismiss a Commission proceeding is not only not prejudiced by an application of the Commission's test to determine the existence of a *prima facie* case, but actually gets an advantage it might not get under the current Rules of Civil Procedure.

The remaining point in the respondent's appeal requires little additional discussion. In stating that he "is of the opinion that dehydrated onion and dehydrated garlic comprise the lines of commerce involved in this proceeding," the hearing examiner, of course, was not making a final determination of this question any more than he was finally determining any other question. Applicable here is an observation made by the Commission in its ruling on a similar contention in the matter of *Brillo Manufacturing Company, Inc.*, Docket 6557, May 23, 1958 (on cross-appeals from an initial decision):

397 ". . . No showing has been made in the appeal that the hearing examiner heretofore has excluded evidence pointing to a substantial competitive inter-relationship between industrial steel wool and other abrasives. As noted above, the issue as to the bounds of the relevant market in Section 7 proceedings is one of fact. Thus, the respondent's right to present evidence showing that products other than steel wool are included within the area of effective competition and, therefore, are a part of the relevant line of commerce is fully protected. . . ."

The respondent's appeal will be denied.

Chairman Kintner and Commissioner Tait concur in the result.

398 [Caption Omitted]

CONCURRING OPINION OF THE FEDERAL TRADE COMMISSION ACCOMPANYING ORDER DENYING APPEAL FROM DENIAL OF CONSOLIDATED'S MOTION TO DISMISS

(Issued on March 4, 1960)

By Tait, Commissioner:

I concur in the result. The respondent's challenge to the hearing examiner's denial of its motion to dismiss cannot succeed in any event because respondent has not shown that the application of a standard differing from the one enunciated in the matter of *Vulcanized Rubber and Plastics Company,* Docket 6222, 52 F.T.C. 533, would have produced a different result.

However, after long reflection and careful consideration, I have reached the conclusion that the standard employed in *Vulcanized Rubber* is erroneous.

Although the *Vulcanized Rubber* opinion flatly declared that the standard set forth therein regarding establishment of a *prima facie* case was "likened" to that used by the Federal district courts in *non-jury* trials, the interpretation now placed upon that opinion by the majority herein seems to be at variance with that previous frank assertion. It is not clear to me what is being proposed at this time by my able colleagues. However, I am now certain of one thing with respect to the *Vulcanized Rubber* standard and that is

399 this: As expressed originally and unqualifiedly it parallels the standard employed by the Federal district courts in *jury* trials rather than *non-jury* trials.

Even though the *Vulcanized Rubber* rule was thus originally misstated in its comparison with the test used by the Federal district courts, it does not necessarily follow that the rule adopted for use by the Commission in its own

adjudicatory proceedings is improper. In determining what rule is properly adaptable to our own quasi-judicial proceedings, however, it would be helpful, although not conclusive, to examine some of the reasons which led to the development of the different standards used by the Federal courts in jury and non-jury trial cases.

The "most favorable inference" standard used in passing upon mid-trial motions to dismiss in jury trials was developed primarily to accord with the allocation of decisional functions in such cases. In a jury case the role of the judge is a limited one; he determines the law, but the jury is the sole trier of the facts, and its role is protected from direct judicial invasion by the strictures of the Seventh Amendment. It follows that the judge in passing upon a mid-trial motion to dismiss cannot be given an unrestricted commission to try the facts. The jury standard is consistent with the limited role of the judge. The judge must send the case to the jury if there is substantial proof of the elements of the plaintiff's charge, even if the judge, if he were the trier of the facts, would himself decide the case against the plaintiff. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913); *Gunning* v. *Cooley*, 281 U.S. 90 (1930); *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 416-421 (D.D.C. 1946), *reversed on other grounds*, 333 U.S. 364 (1948).

But in an action tried without a jury this division of functions no longer obtains. And if a standard prescribing a limited role for the judge lacks utility in this different setting, it should not be applied. Justice Stephens of the Court of Appeals for the District of Columbia in his classic
400 discussion of the two standards states emphatically that:

> "It is not reasonable to require a judge, on motion to dismiss under Rule 41 (b), to determine merely whether there is a *prima facie* case, such as in a jury trial should

> go to the jury, when there is no jury — to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of the facts.*" *United States* v. *United States Gypsum Co., supra,* at 418.

A number of learned commentators have acknowledged the force of Justice Stephens' reasoning. In the commentary, *The Motion to Dismiss in Non-Jury Cases,* 9 Federal Rules Service 986 at 991-992 (1946), the point was made that:

> "Since . . . the judge, in passing upon a motion to dismiss at the close of the plaintiff's evidence, can refer the decision upon . . . [conflicting inferences, the weight of the evidence and credibility] . . . only to himself, there is no necessity for him to 'assume' the truth of the plaintiff's evidence in the first instance, and by inquiring of himself concerning the weight and credibility of the evidence in the next."

Another anomaly inherent in the use of the two-step procedure in a non-jury case where functions have coalesced can best be revealed by posing a hypothetical: A judge sitting without jury in passing upon plaintiff's motion to dismiss employs the jury standard. He is of the opinion that if he were sitting as trier of the fact he would be compelled to grant the motion. However, after resolving all conflicts in favor of the plaintiff, the judge finds that there is a "case for the jury," and denies the motion. The defendant immediately rests without presenting evidence. The judge, as trier of the fact, is compelled to find for the defendant immediately after denying defendant's motion to dismiss.

This anomaly has long haunted judicial minds. See 401 *Lambuth* v. *Stetson & Post Mill Co.,* 14 Wash. 187, 190-191, 44 Pac. 148, 149 (1896), cited with approval in *United States* v. *United States Gypsum Co., supra.*

In Commission proceedings the Commission both determines the law and finds the facts, just as does the judge in an action tried without jury. All the reasons that support the adoption of the non-jury standard in judicial proceedings where these functions are combined equally support the use of the non-jury standard in administrative proceedings. And there is an additional reason why the non-jury standard would appear to be better fitted for agency use. The Commission is an expert body. Its specialized knowledge and experience should give it a heightened sensitivity to the factual situations before it. There is little reason to impose an artificial restraint on a body so equipped. In addition, it should be noted that the anomaly discussed in the *Lambuth* case, *supra,* is just as apt to occur in proceedings before this Commission as in judicial proceedings.

The principal reason for the development of the standard used in non-jury trials was the enhancement of the cause of justice through the elimination of delay. Justice Stephens states the principle in this manner:

> "... [If] the reason for the jury trial practice does not exist in non-jury trials, where the judge is the trier of the facts, the jury trial practice ought not to be applied but should give way in favor of a practice consistent with the spirit of the Federal Rules of Civil Procedure. Rule 1 expressly provides that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.' Therefore, a court should dispose of a case at the first opportunity which is appropriate under the rules and in accord with the rights of the parties. When a court sitting without a jury has heard all of the plaintiff's evidence, it is appropriate that the court shall then
402 determine whether or not the plaintiff has convincingly shown a right to relief." 67 F. Supp. at 417-418.

Due considerations of "just, speedy, and inexpensive determination of every action" are no less applicable to the administrative adjudicatory process. If it is unfair to require a defendant in a non-jury trial to expend the time and money necessary to put in his case where the plaintiff has failed to show a right to relief without the aid of most favorable inferences, then it is no less unfair to impose this requirement upon a respondent in our proceedings. If the expenditure of the time of the court and of public funds required in the continuation of the trial after the plaintiff has failed to show a right to relief cannot be justified, then the expenditure of the time of this Commission and its appropriated funds in a similar situation is also unjustifiable.

Plaintiffs contending for the application of the jury standard in non-jury cases have argued that the use of the Rule 41 (b) standard deprives them of the opportunity to hear the defendant's witnesses and to bolster the case-in-chief through the use of cross-examination. Justice Stephens rejected this contention, saying:

> "A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge as trier of the facts, of a right to relief has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term." 67 F. Supp. at 418.

This contention was rejected also by Judge Learned Hand in *Global Commerce Corp. S. A.* v. *Clark-Babbitt Industries, Inc.*, 255 F. 2d 105 (2d Cir. 1958).

The foregoing considerations would seem to apply with equal force to our own proceedings. In a number of
403 cases the result will be the same regardless of which standard is employed. This is so where the operative

facts are not disputed, where only one inference reasonably may be drawn from a basic fact, and where there are no issues of credibility. And there is a penumbral area of substantial breadth where there are conflicts in the evidence or issues of credibility present, but the trier applying the jury standard nevertheless grants motions to dismiss. This result is reached whenever the trier decides that the evidence adduced so clearly fails to establish the essential elements of the proponent's case that further hearings would be a waste of time.

It should be borne in mind as well that Federal Rule 41 (b) is a discretionary rule. Among other things, it provides that:

> "In an action tried by the Court without a jury the court as *trier of the facts* may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." (Emphasis supplied.)

In a close case the judge may either deny the motion and require the defendant to put in his case, or dismiss the complaint without prejudice. See 5 Moore, Federal Practice, Para. 41.13 [4] (1951). I cannot agree with the majority that the Commission's hearing examiners are wholly without a similar discretion. The powers of the hearing examiner derive basically from Section 7 (b) of the Administrative Procedure Act. Attorney General's Manual on the Administrative Procedure Act, pp. 74, 75. The enumerated powers therein, coupled with our own Rules of Practice, notably Section 3.15(c)(7), seem to indicate that a hearing examiner has the necessary discretion. Nor does Section 3.8 (e) of our Rules appear to impose any limitation as intimated by the majority. To the contrary, the negative inference to be drawn from Section 3.8 (e) itself is that the hearing examiner can *deny* a motion to dismiss at close of the case-in-chief and do so without the necessity of making findings and rendering an initial decision as would other-

wise be required by the granting of such a motion. Should any reasonable doubt exist as to the authority of the hearing examiner, it would be a simple matter to clarify our Rules of Practice. There need be no fear that a close and doubtful case involving a substantial public interest would be dismissed prematurely.

404 The "public interest" is not a unitary concept. One of the criteria of "public interest" in the broad sense is that decisions will be reached on the basis of a record developed under fair rules of procedure. Indeed, in order to retain full public confidence the procedure, in the words of Mr. Justice Holmes, "must not only be fair, but give the appearance of being fair."

It is my firm belief that the Commission should abandon the standard adopted in *Vulcanized Rubber* and adopt the standard now employed by the Federal courts in non-jury cases. By doing so our hearing examiners and counsel will also have readily available a body of precedents to guide them.

Chairman Kintner joins with Commissioner Tait in this concurring opinion.

1098 [Caption Omitted]

ORDER CLOSING ALL PROCEEDINGS BEFORE THE HEARING EXAMINER

(Issued on December 28, 1961)

This proceeding having been closed for the taking of testimony and all procedural steps having been complied with,

IT IS THEREFORE ORDERED that all proceedings before the hearing examiner in the above-entitled case be, and they hereby are, closed.

1099 [Caption Omitted]

INITIAL DECISION OF THE HEARING EXAMINER

(Filed on December 29, 1961)

This proceeding is based upon a complaint charging the respondent, Consolidated Foods Corporation, a corporation, with violation of Section 7 of the Clayton Act, as amended and approved December 29, 1950, by reason of its acquisition of Gentry, Incorporated, a corporation. This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence and proposed findings of fact and conclusions of law, together with briefs and reply briefs presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions of law submitted by both parties and briefs in support thereof, and all findings of fact and conclu-
1100 sions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner being now fully advised in the premises makes the following findings of fact, conclusions drawn therefrom, and order:

1. Respondent, Consolidated Foods Corporation (hereinafter referred to as Consolidated), is a Maryland corporation with its office and principal place of business located at 135 South La Salle Street, Chicago, Illinois. It was originally incorporated as Consolidated Grocers Corporation and changed its name to Consolidated Foods Corporation in February 1954.

2. Respondent was incorporated September 4, 1941, to take over C. D. Kenny, a wholesale grocery house. Subsequent to that time, there has been a series of acquisitions accounting for the rapid and steady growth of Consolidated, until it is now composed of a variety of divisions and sub-

sidiaries engaged in producing and selling food products at wholesale and retail.

3. As of December 31, 1958, Consolidated had eight divisions and subsidiaries engaged in processing food products as follows:

(a) Coastal Foods Division, a processor of canned soups and vegetables at Cambridge, Maryland.

(b) Columbia Foods Division, a processor of vegetables, coffee, pickles, dressings and some fruits at plants in West Chicago, Illinois; Ellsworth, Michigan; Grundy Center, Iowa; Sugarland, Texas; Cambria, Wisconsin; Baltimore, Maryland; and Los Angeles, California. (Baltimore and Los Angeles packed coffee only and are now closed.)

(c) Kitchens of Sara Lee, Inc., which produced bakery goods at Chicago, Illinois.

(d) Ocoma Foods Company, a processor of frozen foods at six plants located in Nebraska, Iowa and Arkansas.

1101 (e) Orchard Hill Farms, Inc., a processor of frozen foods at Red Hook, New York.

(f) Union Sugar Division which produced beet sugar at Betteravia, California.

(g) U. S. Products Corp. Ltd., a processor of canned fruits and vegetables at San Jose and Santa Clara, California, and Salem, Oregon.

(h) Gentry Division, which produced dehydrated onion, dehydrated garlic and capsicums at Gilroy and Oxnard, California.

4. As of December 31, 1958, Consolidated had twelve units which sold products of Consolidated and other food processors at wholesale as follows:

(a) River Grove Division, which sold grocery products in the Chicago, Illinois, area.

(b) International Division, San Francisco, California, which sold grocery products to customers outside the United States.

(c) Lee Foods Division, which sold grocery products to institutional users in the Kansas City, Kansas, area.

(d) Morey Mercantile Division, which sold grocery products to independent retailers in the Denver, Colorado, area.

(e) Dannemiller Grocery Division, which sold grocery products out of branches in Canton, Cleveland and Akron, Ohio, to retailers and institutional users in the vicinity of each of those cities.

(f) E. A. Aaron and Bros., Inc., a wholesale frozen food distributor in Chicago, Illinois, which has since been liquidated.

1102 (g) Western Grocer Division, which operated out of headquarters in Marshalltown, Iowa, with branches in Albert Lea, Minnesota; Davenport, Des Moines and Mason City, Iowa; and Manhattan, Kansas, and which sold to retailers and voluntary groups in the immediate area of each branch.

(h) Monarch Foods Division, which operated limited line branches in Minneapolis, Minnesota; Los Angeles and San Francisco, California; Houston, Texas; Jacksonville, Florida; and Somerville, Massachusetts, and which sold private label products of Consolidated almost exclusively to retailers and institutional users.

(i) Separate Monarch Foods branches, which operated independently of the Monarch Food Division and which were located at Roanoke, Virginia; Baltimore and Cumberland, Maryland; and Columbus, Ohio. These branches were not limited to Consolidated's private label products and sold to retailers, institutional users and voluntary groups.

5. As of December 31, 1958, Consolidated had three units which were engaged in the operation of retail stores as follows:

(a) Piggly Wiggly Midwest Co., which operated

about 50 retail supermarkets in northern Illinois, southern Wisconsin and eastern Iowa.

(b) Klein Supermarkets, Inc., which operated about 25 retail supermarkets in Minneapolis and St. Paul, Minnesota.

(c) Lawson Milk Division, which processed dairy and bakery products and sold them at retail with a very small line of other groceries, through small dairy-type stores in Akron, Canton and Cleveland, Ohio.

1103 6. During the period from July 1, 1950, to June 30, 1951, the net sales of Consolidated were $174,006,801. Its net sales for the period from July 1, 1955, to June 30, 1956, totaled $268,252,695. As of June 30, 1951, the assets of Consolidated totaled approximately $60,000,000 and by June 30, 1956, its total assets increased to more than $99,000,000.

7. Prior to April 30, 1951, Gentry, Incorporated, was a California corporation with its office in Los Angeles, California. It was principally engaged in the production and sale of dehydrated onion and garlic. It also produced and sold capsicum spices, such as paprika, chili pepper, chili powder and hot peppers. Gentry was organized in 1919 and was, successively, a sole proprietorship, a partnership and a corporation and its early business was that of a jobber, of chili and paprika and later dehydrated onion and garlic. In 1940, Gentry built a new plant in Gilroy, California, which it has used since that time for production of dehydrated onion and garlic. In 1946, Gentry built a plant in Oxnard, California, to which it transferred its capsicum operations.

8. On April 30, 1951, Consolidated acquired the assets of Gentry, Incorporated, in exchange for 66,546 shares of the common stock of Consolidated, having a market value of approximately $1,000,000. At the time of said acquisition both Consolidated and Gentry were engaged in interstate

commerce. The assets so acquired had a net value at that time of $1,600,000. Gentry distributed Consolidated stock to its shareholders and was dissolved. Its business was thereafter operated as a division of Consolidated.

9. At the time of its acquisition in 1951, Gentry had three domestic competitors engaged in the production and sale of dehydrated onion and garlic:

(a) Basic Vegetable Products, Inc., which has its plant in Vacaville, California, and has been engaged in the processing of dehydrated onion and garlic since 1933;

(b) Puccinelli Packing Company, which has plants at Turlock and Livingston, California, and has been engaged in the processing of dehydrated onion and garlic since 1946; and

1104. (c) J. R. Simplot Company, Boise, Idaho, which has its processing division in Caldwell, Idaho. Simplot was engaged in the processing of dehydrated onion from 1940 to 1956 when all onion dehydration equipment was removed and the entire plant was converted to the production of frozen french fried and dehydrated potatoes.

10. Gentry, Basic, Puccinelli and Simplot comprised all of the processors of dehydrated onion and garlic in the United States at the time of the acquisition in 1951. Since that date, as noted above, one company has withdrawn from competition in the processing and sale of dehydrated onion and garlic, and a new company, Gilroy Foods, Inc., began production of dehydrated garlic in 1959 and dehydrated onion in 1960. In 1961, Gilroy was acquired by McCormick & Company of Baltimore, Maryland, a processor and distributor of a variety of spices, seasonings, condiments and other products.

11. Sales in pounds of dehydrated onion and dehydrated garlic by Basic, Gentry, Puccinelli and Simplot and their market shares in the domestic market for the period from 1948 through 1958, are as shown in the following tables:

SALES OF DEHYDRATED ONION BY MEMBERS OF AMERICAN DEHYDRATED ONION AND GARLIC ASSOCIATION (1948-1958)

Calendar Year	Pounds Sold					Percentage of Total			
	Basic	Gentry	Puccinelli	Simplot	Total	Basic	Gentry	Puccinelli	Simplot
1948	4,495,697	1,737,641	202,954	824,678	7,260,970	62	24	3	11
1949	3,048,532	1,742,643	506,530	235,941	5,533,646	55	31	9	5
1950	4,693,360	2,158,880	523,971	425,948	7,802,159	60	28	7	5
1951	8,071,202	3,610,313	662,977	1,276,851	13,621,343	59	27	5	9
1952	6,976,146	3,253,113	894,107	726,293	11,849,659	59	27	8	6
1953	6,160,254	4,222,718	832,552	520,486	11,736,010	52	36	7	5
1954	7,154,546	3,135,354	500,047	55,774	10,845,721	66	29	4	1
1955	7,812,785	3,914,770	1,150,883	823,079	13,701,517	57	29	8	6
1956	8,474,046	4,840,238	1,262,155	36,190	14,612,629	58	33	9	—
1957	8,780,710	6,485,052	1,771,199	—	17,036,961	52	38	10	—
1958	10,420,944	6,259,171	1,467,092	—	18,147,207	57	35	8	—

Note: Percentages rounded off to nearer whole.

SALES OF DEHYDRATED GARLIC BY MEMBERS OF AMERICAN DEHYDRATED ONION AND GARLIC ASSOCIATION (1948-1958)

Calendar Year	Pounds Sold				Percentage of Total		
	Basic	Gentry	Puccinelli	Total	Basic	Gentry	Puccinelli
1948	457,177	772,061	No Data	1,229,238	No Data	No Data	No Data
1949	575,038	790,495	120,495	1,486,028	39	53	8
1950	652,059	922,073	225,386	1,799,518	36	51	13
1951	832,030	972,553	223,323	2,027,906	41	48	11
1952	878,879	1,172,308	289,987	2,341,174	38	50	12
1953	1,165,629	1,252,876	222,609	2,641,114	44	47	9
1954	1,324,951	1,346,701	249,376	2,921,028	45	46	9
1955	1,765,204	1,698,176	413,806	3,877,186	46	44	10
1956	1,900,149	1,753,211	385,844	4,039,204	47	43	10
1957	1,876,214	2,103,000	537,657	4,516,871	42	47	11
1958	2,575,041	1,979,834	572,167	5,127,042	50	39	11

Notes: 1. Percentages rounded off to nearer whole.
2. Simplot did not produce dehydrated garlic.
3. Since Puccinelli data for 1948 is not available, the total for that year includes only Basic and Gentry.

1107 12. The lines of commerce involved in this proceeding are the production and sale of dehydrated onion and dehydrated garlic. The parties to this proceeding are in agreement that the production and sale of the above designated products comprise the lines of commerce and testimony and other evidence were introduced by both parties on this assumption. Since the processors and distributors of dehydrated onion and garlic sell their products nationally, the area of effective competition to be considered in this proceeding is the entire United States. Foreign imports of dehydrated onion and garlic comprise a very small percentage of the total sales of these products, averaging less than 5% annually.

13. The acquisition of Gentry has not only created a protected market for Consolidated, insofar as suppliers who are already purchasing dehydrated onion and garlic from its Gentry Division are concerned, but in addition has served as an inducement for concerns to buy onion and garlic from the Gentry Division of Consolidated where such concerns were desirous of becoming suppliers of Consolidated. An example of this is the Phillips Packing Company which placed an order for 1,000 pounds of white onion powder with the Gentry Division of Consolidated in the hope that it could in time sell its products to Consolidated.

14. The acquisition of Gentry gave Consolidated the opportunity to use express or implied business coercion to induce suppliers purchasing dehydrated onion and garlic from other sources to purchase some or all of their requirements from the Gentry Division of Consolidated. There is ample evidence in the record that both Gentry and Consolidated have exercised pressure and have attempted to influence, by affirmative action, some of Consolidated's suppliers to purchase a substantial part if not all of their dehydrated onion and garlic requirements from Gentry. Consolidated was successful in some instances, even though

objections had been raised as to the quality of Gentry's products as compared with the products of its competitors. This indicates the value of the so-called reciprocity policy, when used as a competitive weapon.

1108 15. Prior to the acquisition, Gerber Products Company did not purchase any of its requirements from Gentry as it considered Gentry products as not being satisfactory. Gerber was a substantial supplier of baby food to the various divisions of Consolidated, including its retail outlets. Joseph Farrell of Gentry, for the purpose of obtaining Gerber's business, on July 14, 1952, wrote Gerber offering to manufacture white onion powder according to Gerber's specifications and asked for a statement of Gerber's requirements of this product. In order to remind Gerber of the purchases being made by Consolidated from Gerber, Farrell stated in this letter:

> "Be assured of the fact that we want to work very closely with your company. We feel very close to your merchandise, for the obvious reason that it is to be found in all of our various divisions for sale to the buying public. We, in Gentry, realize that Gerber's Baby Food Products are a wonderful line and we are happy to see them selling exclusively in the divisions of our Consolidated Grocers Corp." (CX 20-C)

On the same date, Farrell wrote L. C. Bellisime, Vice President of the Gentry Division, concerning the Gerber account informing him that he was taking this matter up with John Sarther, President of the Sprague Warner Division, and S. M. Kennedy, President of Consolidated:

> "* * * to get us a better 'shake of the dice' than we have gotten from this company. After all, as you know, Sprague Warner, as well as many of the other divisions, we believe, use Gerber's baby food products exclusively, so there should be no reason at all why Gerber Food Products should not use Gentry's material ex-

clusively and we don't mean up to 50%, as has been tentatively promised us. We mean 100%." (CX 20-A)

Daniel Gerber, President of Gerber Products, testified in this proceeding that some time back, he had had a conversation with Nathan Cummings, Chairman of the Board
1109 of Consolidated, who informed him that Consolidated had acquired Gentry and that they would like to have consideration. Thereafter, Gerber made purchases from Gentry.

16. Gentry had never been able to sell J. J. Gielow & Sons, Inc., a processor of pickles located in Detroit, Michigan. Gentry requested Emil Kohut, of the Consolidated Buying and Purchasing Offices, to assist it in obtaining business from Gielow in view of the substantial sales it was making to Consolidated. Later, L. C. Bellisime, Vice President, of the Gentry Division, was informed by Bischmann, Vice President, of Reid Murdoch, a division of Consolidated, that Murdoch had placed an order with Gielow for 200,000 cases of pickles. Bellisime passed this information on to Martin Kraham of Gentry who wrote W. W. Kearney of Gentry on July 13, 1953:

> "You might tell Les Gielow that we have discussed the situation with Mr. Bischmann, president of Reid Murdoch, and Gielow knows that back in April he received an order for 200,000 cases of pickles. Half of that quantity is for Kosher Dill. Let him know, in no uncertain terms, we are not happy at the switch and do not expect the old 'Viennese Waltz' with reference to the order he placed with me in good faith." (CX 27)

In 1953, Gielow purchased 1100 pounds of dehydrated onion and 450 pounds of dehydrated garlic from Gentry and beginning in 1954, Gielow purchased all of its dehydrated onion and garlic from Gentry replacing Basic as a supplier altogether. The following are the purchases by Gielow for dehydrated onion and garlic from Gentry and Basic

for the years 1952 through 1958:

	Gentry		Basic	
Year	Onion	Garlic	Onion	Garlic
1952	225	450	13,380	12,078
1953	1,100	450	10,200	10,692
1954	14,937	12,261		
1955	18,200	19,160		
1956	4,635	2,870		
1957	11,490	13,910		
1958	3,000	7,500		

1110 17. In 1951, Joe Sarther, President of Sprague Warner Division of Consolidated, called Clarence Brickman, Vice President and Manager of the Illinois Meat Company, and asked that he give the Gentry Division some business. As a result, Brickman gave Gentry some orders and thereafter purchased more from Gentry and less from Basic, until 1953 when he bought exclusively from Gentry. Basic never regained this business, although the Illinois Meat Company did later purchase dehydrated onion from Simplot and Puccinelli.

18. The Morgan Packing Company is an example of the use of pressure to induce a supplier of Consolidated to purchase Gentry products at a time when it considered Gentry's products inferior and did not want to purchase them. Morgan purchased its requirements of dehydrated onion and garlic from Basic from the time it began using these products. Its laboratory considered the Gentry products inferior to Basic onion and garlic. Gentry's salesman, Sherrod, reporting on April 25, 1952, that the buyer from Morgan could do nothing because of the laboratory report stated:

> "We have brought pressure here through the medium of C. D. Kenny Division Columbus, Ohio branch and these people have been very helpful with us in an effort to assist us in obtaining business from Morgan.

You will have in mind Morgan Packing Company does a great business and they freely admit this with C. D. Kenny." (CX 72-B)

On November 7, 1952, Joe Farrell of Gentry wrote letters to S. M. Kennedy, President of Consolidated Grocers Corporation, and Emil Kohut of Consolidated Buying and Purchasing Division, describing the difficulties in trying to sell Morgan Packing Company and asked for their assistance.

Thereafter, on November 24, 1952, Carl Sherrod, Gentry's salesman, reported that he had sold a small order to Morgan Packing Company for experimental purposes. He also stated:

1111 "We have everyone of any consequence connected with Morgan Packing Company literally jumping up and down, especially their sales department in an effort to assist us in selling their production and purchasing department on using our products. This is unquestionably the result of Mr. Kennedy's assistance, as we have been unable to do much of anything with this user in the past." (CX 76 A-C)

On December 2, 1952, Sherrod also wrote G. E. Clausen, President of Gentry, with reference to the trial order, stating in part as follows:

"There is no question in the world but what the trial order which I received this week was obtained as the result of Mr. Kennedy's efforts in our behalf through Morgan's broker, Earl Roll of Chicago." (CX 77)

On December 11, 1952, George Clausen, President of Gentry, wrote Carl Sherrod, stating in part as follows:

"Carl, when I was in Chicago about three weeks, I talked with Mr. Kennedy about this account. He mentioned the large amount of business that Consolidated Grocers is doing with Morgan Packing Company and that the Morgan Packing Company expressed appreciation of their business and would like to reciprocate

in buying onion and garlic products from Consolidated Grocers Corporation." (CX 78 A-B)

On March 19, 1954, Carl A. Sherrod wrote Martin Kraham of Gentry with reference to Morgan Packing Company, stating:

"After we received some help from Consolidated Foods office we did begin to sell them some material."

He also informed Kraham for some reason Morgan did not want to buy from Gentry and further said:

1112 "Another thing which you should have is the fact that the only time that I have ever received a really cordial reception at Morgans was after some assistanee from Con Grocers in Chicago and at that time I contacted Mr. Ben Williams, a vice president of this company. At that time I was taken into his office and invited to sit down. He in turn called in Mrs. Eversole and we had a lengthy discussion. The result of that visit with the vice president in the company of Mrs. Eversole was a little onion and garlic.

"Marty, I believe that will give you a rather complete picture in asfar as Morgan Packing Company is concerned and it will greatly appreciated (*sic*) if you will present the facts to the proper people in Con Grocers and solicit there for their assistance in obtaining more business from Morgan to which certainly our company is entitled." (CX 80 A-B)

As a result of this continued pressure, Morgan was finally induced to purchase a substantial portion of its requirements from Gentry.

19. In the matter of the F. H. Snow Canning Co., on March 2, 1953, Joe Farrell wrote Emil Kohut, Consolidated Buying and Purchasing Offices, with reference to the F. H. Snow Canning Co., as follows:

"Snow Canning Co., Pine Pt., Maine—With the exception of one order that we received a couple of years ago,

we have never done business with this company before or since. They buy two cars of Onion and Garlic products per year from our direct competitor and we see a very dim outlook in the future for us relative to changing this situation. I understand that considerable canned soups are bought from this firm by Consolidated Grocers' eastern division and here in the middle-west, also. Any help that you can give us will be appreciated." (CX 12 A-B)

1113 On the same date, Farrell wrote S. M. Kennedy, President of Consolidated Grocers Corporation, giving substantially the same information and asking his assistance with this supplier. Thereafter, the F. H. Snow Canning Co., began purchasing a substantial portion of its requirements from the Gentry Division, as follows:

	1954	1955	1956	1957
Onion	——	36,125	48,600	69,900
Garlic	——	600	1,620	600

20. In the matter of the George F. Hormel Company, on August 31, 1953, L. C. Bellisime, Vice President of Gentry, wrote Martin Kraham of Consolidated as follows:

"I agree with you that in view of the letter that we now stand to gain nothing by waiting, and I think that now would be the time to start moving.

"It would be my thinking that we bring no pressure direct on Hormel through Gentry. I think that pressure should come from Con Grocers and I suggest that at the very first opportunity you discuss the entire Hormel matter with Kennedy and Gifford, showing them Murphy's letter and getting an idea how much Con Grocers buys from Hormel, with the thought in mind that pressure be applied from that end of it." (CX 121)

While the record does not definitely prove that any pres-

sure that may have been brought against Hormel was effective, this correspondence does prove a policy on the part of Consolidated to use pressure or force suppliers to purchase dehydrated onion and garlic from Gentry. That this was a continuing policy is indicated by statement appearing in letter of March 17, 1955, from Joseph D. Farrell, of Gentry, to Robert H. Perlitz, Vice President, Sales and Advertising, Consolidated Foods Corporation, as follows:

1114 "I want to thank you, Bob, for your letter of March 10th and your comments relative to your meeting with Messrs R. D. Arnay, Sales Manager for Hormel, Ralph Keller, General Manager Chicago Sales Operation and Ken Forbes. Many thanks for your efforts in our behalf." (CX 50 A-B)

21. The lengths to which respondent would go to pressure a supplier of Consolidated to buy Gentry products is typified by the transactions with the Grocery Store Products Company, a supplier of Consolidated who did not purchase and did not want to purchase dehydrated onion and garlic from Gentry. As early as September 28, 1951, Gentry requested the assistance of Consolidated and Mr. Kennedy, the President of Consolidated, to sell Grocery Store Products Company. After some correspondence, it was decided to have G. K. Wetzell, buyer for Sprague Warner Division, write Jack Ross, President of the Grocery Store Products Company, which he did on January 11, 1952. Although Gentry's salesman reported a cordial reception, he received no order. This situation continued through 1953 and 1954 and was summed up by Joseph D. Farrell in his letter of March 17, 1955, to Robert H. Perlitz, Vice President, Sales and Advertising:

"You will recall, when I had the pleasure of talking with you in Kansas City, that one of the companies on

which I solicited your generous help was the Grocery Store Products Company with headquarters in West Chester, Pa.

"Quite frankly, Bob, this is a company that gives us no end of annoyance on every call that we make on their buyer. Every so often there is a change in purchasing agents and now they have a Mr. J. F. Gilmour. Despite the fact that we have received a multitude of promises from this company that they would split the business between their present source of supply and Gentry, it seems that their promises have all been in vain.

"Our latest report from our salesman covering this situation states as follows. The last order went to 1115 Basic Vegetable Company and the buyer stated that even if we had an equal price Basic would have obtained this business because they have been doing business with that account for many years, even though they fully recognize that our merchandise is easily as good or it may even be better.

"It is understood that Consolidated Foods buys huge quantities of materials from the Grocery Store Products Company and, therefore, I wonder whether or not it would be at all possible for us to give these people the same sort of treatment when they call on us? We would very much appreciate your cooperation and any comments that you would care to make would be sincerely appreciated by the writer." (CX 50 A-B)

Perlitz discussed this matter with Frank Lamarche, Vice President of the Grocery Store Products Company, who later wrote Perlitz on April 25, 1955, as follows:

"Confirming our conversation of last week, as I stated then I was not familiar with the buying of dehydrated vegetables as my efforts are confined entirely to sales.

However, I have had an opportunity to check up with the purchasing department, and the story seems to be that for years Basic have worked very closely with our production department—in fact, made it possible for us to get several of the vegetables which had previously not been available, with the result that as long as Basic is completely competitive and able to give us the quality and service they have been, it is felt that due to the help they have been to the production department, they should continue to get the business." (CX 54-B)

Upon receipt of this information, Joseph Farrell of Gentry wrote Robert Perlitz of Consolidated attempting to refute the contents of the letter of Lamarche and further stated:

1116 ". . . So, I would frankly say that it would help us immeasurably if it could be told to this company that if they don't feel that our merchandise is good enough for them, then, frankly speaking, their merchandise is not good enough for us.

"This is one company that has absolutely gone out of its way to adulterate the truth with a lot of distortions and as men engaged in sales, such as you and I, we both do not like this type of treatment. If a company does not want to buy from us, they should tell us such, but when they give us a lot of promises from the President on down and then go out of their way, right up until the last moment, to keep us in suspense and finally give this business to our competitor, I think that you will appreciate the situation that we have with the Grocery Store Products Company.

"Needless to say, any further cooperation that you can give us relative to this company to remind them of the facts as outlined in this letter will be sincerely appreciated." (CX 56 A-B)

As requested, on May 17, 1955, Perlitz of Consolidated asked Frank Lamarche, Vice President of the Grocery Store Products Company, to call upon him when in Chicago. Thereafter, an order was received from the Grocery Store Products Company for 10,000 pounds of white onion chips which was reported to Perlitz by Joseph Farrell in his letter of June 30, 1955:

> "I take pleasure in letting you know that because of your efforts we were instrumental in being able to sell the Grocery Store Products Company in West Chester, Penna. about 10,000 pounds of our White Onion Chips.
>
> "All I can say, Bob, is many, many thanks. We truly appreciate what you have done for us and without your help we might have gone on for the next few years without any business from this company.
>
> 1117 "Since I am unable to shake your hand and thank you in person, would you be good enough to accept the sentiments expressed in this letter until we meet again." (CX 60)

22. In the matter of the P. J. Ritter Company, after intervention of Nathan Cummings, Chairman of the Board of Consolidated, with William H. Ritter, Jr., President of the P. J. Ritter Company, Gentry was selected as a regular second source of supply for dehydrated onion and garlic, although the Ritter chemists had objected to the quality of the Gentry products and expressed the opinion that Basic had consistently maintained a higher quality than Gentry.

CONCLUSIONS

1. The lines of commerce involved in this proceeding, as hereinbefore found, are the production and sale of dehydrated onion and the production and sale of dehydrated garlic, and the section of the country involved is the entire United States.

2. The type of acquisition in this proceeding has been designated as a conglomerate merger which implies the absence of pre-merger competition or supply relationships between the acquired and acquiring concerns. The record does show that there were several divisions of Consolidated Foods Corporation who used dehydrated onion and garlic but the amount supplied by Gentry after the acquisition was not sufficiently substantial to require consideration as a vertical merger.

3. Section 7 of the Clayton Act, as amended, applies to conglomerate as well as horizontal and vertical mergers where the effect may be substantially to lessen competition or tend to create a monopoly.

4. The record is clear that the conglomerate merger in this proceeding has the required effect of substantially lessening competition and tending to create a monopoly.

1118 5. The respondent, Consolidated Foods Corporation, is a financially powerful and aggressive commercial organization which purchases large quantities of canned and processed food products from independent suppliers of food products for resale, both at wholesale and retail through its various divisions. This volume of purchases has permitted Consolidated to place pressure upon these suppliers and unfairly induce them to purchase all or a substantial portion of their requirements of dehydrated onion and garlic from the Gentry Division of Consolidated as opposed to the competitors of the Gentry Division in the dehydrated onion and garlic industry.

6. The acquisition of Gentry by Consolidated created a substantial change in the dehydrated onion and garlic industry and resulted in the replacement of Gentry by a substantially stronger over-all competitive unit in an industry composed of relative equals. It created a gross disparity between the total competitive strength of Consolidated

Foods Corporation and the three small competitors, which indicates a serious industry imbalance, the effect of which may be to substantially lessen competition and tend to create a monopoly.

7. The competitive position or share of the market enjoyed by Gentry, under respondent's control, in the production and sale of dehydrated onion and garlic, has been enhanced to the detriment of actual and potential competition.

8. The acquisition of Gentry, Incorporated, by Consolidated Foods Corporation has the effect of substantially lessening competition and tending to create a monopoly in the relevant lines of commerce in violation of Section 7 of the Clayton Act, as amended.

9. As the injury to competition in this proceeding is primarily based upon the activity of Consolidated Foods Corporation in the dehydrated onion and garlic industry, any order of divestiture will effectively remove the opportunity and power of Consolidated to interfere in and lessen competition in this industry. Any order of divestiture which may be issued in this proceeding should not preclude officers, directors and employees of the original Gentry, Incorporated, from purchasing the Gentry Division, if they are not at the time of purchase officers or directors of Consolidated Foods Corporation.

1119 ORDER

IT IS ORDERED that the respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, within six (6) months from the date this order becomes final, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to, all plants, equipment, trade names,

trademarks and goodwill acquired by Consolidated Foods Corporation as a result of the acquisition by Consolidated Foods Corporation of the assets of Gentry, Incorporated, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Gentry, Incorporated, so acquired, in such manner as to restore it as a going concern in the production and sale of dehydrated onion and garlic and other products in which said Gentry, Incorporated, was engaged at and immediately prior to the time of said acquisition by respondent Consolidated Foods Corporation.

IT IS FURTHER ORDERED that by such divestiture none of the stocks, assets, rights, or privileges, tangible or intangible, acquired or added by respondent, shall be 1120 sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with, or under the control, direction, or influence of respondent or any of respondent's subsidiary or affiliated corporations.

PROVIDED, HOWEVER, that nothing herein contained shall prohibit the purchase of the assets of the Gentry Division upon divestiture by Consolidated Foods Corporation by any officer, director, or stockholder of the original Gentry, Incorporated, prior to its acquisition by Consolidated Foods Corporation, who is not an officer or director of Consolidated Foods Corporation at the time of such purchase.

IT IS FURTHER ORDERED that the respondent, Consolidated Foods Corporation, shall, within sixty (60) days from the date upon which this order becomes final, submit its plan of compliance in writing for approval by the Federal Trade Commission.

1401 [Caption Omitted]

FINDINGS OF FACT, CONCLUSIONS, AND ORDER OF THE FEDERAL TRADE COMMISSION

(Issued on November 15, 1962)

FINDINGS OF FACT

The Commission adopts findings "1" through "12" of the hearing examiner's initial decision as its own. The Commission's other findings of fact are set forth in the accompanying opinion.

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. Section 7 of the Clayton Act, as amended, prohibits any merger—horizontal, vertical, conglomerate, or otherwise—where the effect may be substantially to lessen competition or to tend to create a monopoly.

3. The effect of the acquisition of Gentry, Incorporated, by Consolidated Foods Corporation may be substantially to lessen competition in the domestic production and sale of dehydrated onion and garlic in violation of Section 7 of the Clayton Act, as amended.

1402 ORDER PROVIDING FOR THE SUBMISSION OF PROPOSALS FOR FINAL ORDER

This case having been heard by the Commission upon respondent's appeal from the initial decision, and the Commission having determined that an appropriate divestiture and cease and desist order should be issued to conform with its decision as set forth in the accompanying opinion:

IT IS ORDERED that counsel supporting the complaint shall, within twenty (20) days after service of this order, file with the Commission a proposed form of order appropriate to the decision, together with a supporting memorandum; that counsel for respondent may, within twenty

(20) days after service of said proposed order and memorandum, file an alternative form of order, together with a supporting memorandum; and that counsel supporting the complaint may, within ten (10) days after service of said alternative order and memorandum, file a statement in reply thereto. The Commission will thereafter enter its final order.

By the Commission. Commissioner Anderson dissenting and Commissioner Higginbotham not participating.

1403 [Caption Omitted]

OPINION OF THE FEDERAL TRADE COMMISSION ON CONSOLIDATED'S APPEAL FROM THE INITIAL DECISION OF THE HEARING EXAMINER

(Issued on November 15, 1962)

This is an appeal from an initial decision of the hearing examiner that the acquisition by respondent, Consolidated Foods Corporation, a large diversified processor and seller of food products, of the assets of Gentry, Incorporated, a company primarily engaged in the production of dehydrated onion and garlic, was proscribed by Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18).[1] The examiner determined that the acquisition of Gentry by Consolidated "has the effect of substantially lessening com-

1. Section 7 provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

petition and tending to create a monopoly in the rele-
1404 vant lines of commerce in violation of Section 7 of the
Clayton Act, as amended." (Initial Decision, p. 20) By way of remedy, his proposed order would require Consolidated to divest itself of Gentry within six months from its effective date.

I.

Many of the facts, as found by the hearing examiner, are not in dispute. Respondent, a Maryland corporation with its office and principal place of business in Chicago, Illinois, was incorporated in 1941 as a wholesale grocery house. Subsequently, it expanded by merger to encompass a wide variety of food industry enterprises. As of December 31, 1958, respondent operated eight manufacturing divisions or subsidiaries engaged in processing canned soups, pickles, dressing, fruits, bakery goods, frozen foods, beet sugar, dehydrated onion, dehydrated garlic, and capsicum spices in plants located in eleven different states scattered across the continent. In addition, it sold food products at wholesale through twelve units in an equal number of states, and at retail through three units, including the well-known midwestern chains, Piggly-Wiggly Midwest Co. and Klein Supermarkets, Inc.

Respondent has exhibited a capacity for vigorous growth. Its net sales from July 1, 1950, to June 30, 1951, were $174,006,801. For the period July 1, 1955, to June 30, 1956, they had risen to $268,252,695. On June 30, 1951, respondent had assets of approximately $60,000,000. By June 30, 1956, the figure was more than $99,000,000.

Respondent's acquisition of Gentry, Incorporated, took place on April 30, 1951. Both before and since that date Gentry has been a manufacturer of dehydrated onion and garlic and of assorted capsicum spices. By comparison with Consolidated, Gentry is a small concern. At the time of

acquisition, it operated two plants and had assets valued at $1,600,000.

This case involves only Gentry's dehydrated onion and garlic business, which comprises the bulk of its trade. When Gentry was acquired by Consolidated it had only three domestic competitors in the production and sale of dehydrated onion and two in dehydrated garlic. Since that time, one firm has left the onion field but another has
1405 entered both, so that four firms constitute the entire industry.[2] The domestic processing and sale of both dehydrated onion and dehydrated garlic are dominated by Gentry and one principal competitor, Basic Vegetable Products, Inc. In 1950, immediately prior to the Consolidated-Gentry merger, Basic accounted for 60% and Gentry 28% of dehydrated onion sales. By 1958, these figures were 57% and 35%, respectively. In dehydrated garlic sales, Basic had 36% of the market in 1950 and 50% in 1958, while Gentry's shares were 51% and 39% for the same years.

The industry as a whole is burgeoning due to the development in recent years of new foods, such as dehydrated soups, containing its products. In 1950, total industry sales of dehydrated onion equalled 7,802,159 pounds, of which Basic sold 4,693,360 and Gentry 2,158,880. By 1958, industry sales were 18,147,207 pounds, with Basic accounting for 10,420,944 pounds of this total and Gentry 6,259,171. The industry produced 1,799,518 pounds of dehydrated garlic in 1950; by 1958, the total was 5,127,042 pounds. During the corresponding period Basic's sales moved from 652,059 pounds to 2,575,041, and Gentry's from 922,073 pounds to 1,979,834.

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2. Competition from foreign imports has not been great in the years under consideration. For example, in 1958 imported onion sales equalled less than 4% of sales of domestically produced onion, and imported garlic only a little more than 2% of domestic garlic.

II.

Under Section 7 of the Clayton Act a merger is unlawful if its likely effect would be to lessen competition substantially in the relevant product and geographical markets. It is agreed that Consolidated and Gentry were not competitors prior to this merger and that sales by Gentry to Consolidated were insubstantial. Thus, the acquisition did not involve the kind of competitive effects usually associated with "horizontal" or "vertical" mergers in the ordinary usage of those terms. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

The gravamen of this proceeding was that the merger was illegal under Section 7 of the Clayton Act because it created the serious danger that Gentry would acquire
1406 a protected market, in which fair competitive opportunities would be denied to other sellers of dehydrated onion and garlic, as a result of the trade practice known as "reciprocity". Section 7 is designed, of course, to "nip in the bud" such changes in the structure of an industry, produced by corporate acquisitions, as are likely to bring about substantial lessening of competition. It must be emphasized at the outset that in a Section 7 case (as distinguished from a Sherman Act case or a proceeding under Section 5 of the Federal Trade Commission Act), the inquiry does not focus on overt anticompetitive trade practices as such, but rather on changes in market or industry structure that are effected by the challenged merger and that may have anticompetitive consequences. Thus, in this case the inquiry must focus on the likely effect of the Consolidated-Gentry merger on the competitive forces at play in the dehydrated onion and garlic industries.

As generally understood, reciprocity describes the practice whereby firms, overtly or tacitly, make concessions to one another in order to promote their own business interests. Perhaps the most common form of reciprocity is the

type involved in this case—reciprocal buying. In this context it involves nothing more than the simple idea that "I will buy from you if you will buy from me", or the unspoken "If I buy from him, he will buy from me".

The situation before us here, for example, is relatively straightforward. As a wholesaler and retailer of food, Consolidated buys the products of many food processors. A substantial number of these processors require dehydrated onion and garlic in packing their foods. It can be readily understood that food processors who use dehydrated onion or garlic and are anxious to sell or to continue to sell their products to Consolidated will, to say the least, consider Gentry's connection with Consolidated in selecting a source of supply of onion and garlic. Indeed, complaint counsel contends, and the hearing examiner found, that Consolidated relied on the influence generated by its buying power to induce these processors to purchase onion and garlic from its Gentry Division. The examiner's conclusions in this regard were as follows:

> "The acquisition of Gentry gave Consolidated the opportunity to use express or implied business coercion to induce suppliers purchasing dehydrated onion and garlic from other sources to purchase some or all of their requirements from the Gentry Division of Consolidated. There is ample evidence in the record that both Gentry and Consolidated have exercised pressure and have attempted to influence, by affirmative action, some of Consolidated's suppliers to purchase a substantial part if not all of their dehydrated onion and garlic requirements from Gentry. Consolidated was successful in some instances, even though objections had been raised as to the quality of Gentry's products as compared with the products of its competitors. This indicates the value of the so-called reciprocity policy, when used as a competitive weapon." (Initial Decision, p. 9)

III.

While contending that the reciprocity aspect of the Consolidated-Gentry merger is less restrictive of competition than a vertical merger, respondent does recognize an analogy between the two types of merger. In a vertical merger the danger to competition lies in the likelihood that the union of previously independent supplier and customer companies will foreclose their share of the market to competitors who previously had an equal opportunity either to buy from the supplier company or to sell to the customer company. So too with reciprocity resulting from a conglomerate or diversification merger. Here competition will be adversely affected if the reasonable likelihood arises that Gentry's competitors will be to some degree foreclosed by the Gentry-Consolidated merger from having the opportunity of selling to that portion of the market composed of Consolidated's suppliers. Consequently, the extent of potential foreclosure greatly exceeds that resulting from the slight vertical relationship existing between Gentry and Consolidated.

To satisfy the requirements of Section 7, it must be shown that the effect of the acquisition may be *substantially* to lessen competition. Respondent asserts that proof of such substantiality is not only lacking here but that the contrary has been affirmatively demonstrated. Respondent's evidence on this point consists principally of (a) a statistical presentation indicating that Gentry has not come
1408 to dominate the industry in the years since the merger, and (b) the testimony of a number of witnesses who stated that they began buying Gentry products only for valid business reasons, *e.g.*, because Gentry had improved its manufacturing process, or because the buyer decided that he preferred having at least two sources of supply.

These contentions, coupled with the requirements of Sec-

tion 7, appear to necessitate resolution of three separate questions if the examiner's finding of violation is to be upheld. First, is business reciprocity, as it is presented here, anticompetitive in its effect? Second, if the answer to this question is in the affirmative, did Consolidated's acquisition of Gentry transform sufficiently the market structure of this industry to create an environment conducive to anticompetitive reciprocity? Third, if both answers are yes, is the threat to competition sufficiently substantial to bring the merger within the prohibitions of Section 7?[3]

1409 IV.

The anticompetitive effect of business reciprocity is made clear by three cases in which the Commission held that overt and coercive implementation of reciprocity is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. § 45). In the first of these, *Waugh Equipment Co.*, 15 F.T.C. 232, high officials of the large meat packing concern, Armour & Co., acquired stock in

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3. The answer to a fourth question, whether the market affected is substantial (see, *e.g., United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 595), is not open to doubt. The geographic market is the entire United States. The product markets encompass all dehydrated onion and garlic, of whatever price, quality, or characteristics, produced in this country. And the dollar volume of business is significant, as the following table, taken from figures compiled by respondent, indicates.

	Dehydrated Onion	Dehydrated Garlic
Basic, 1950	$ 2,320,067	$ 438,679
Gentry, 1950	1,139,033	621,403
Industry, 1950	3,905,830	1,200,197
Basic, 1958	$ 5,913,521	$ 1,947,723
Gentry, 1958	3,547,338	1,536,508
Industry, 1958	10,145,606	3,831,099

the Waugh Equipment Co., a minor manufacturer of draft gears, and commenced to use Armour's vast power as a major rail shipper to induce railroad companies to buy draft gears from Waugh. Although Waugh's gear was practically unknown in 1924, when the reciprocity campaign commenced, the company was enabled to vault from obscurity to industry leadership in only six years. Its share of the market for draft gears for new freight equipment rose from less than 1% in 1924 to approximately 35% in 1930.

In finding a violation of Section 5, the Commission pointed out that other draft-gear manufacturers made their sales presentations to the mechanical, operating, and purchasing departments of the railroads, rather than to their traffic departments, and that the factors ordinarily considered by the railroads were price, quality, and salesmanship. The Commission further found that the efforts of the Armour officials on Waugh's behalf resulted, in many instances, in railroads purchasing Waugh gears contrary to the recommendations of their mechanical officials and in disregard of the bids of competitors. Those competitors had no appreciable traffic to offer the railroads and were therefore unable to meet Waugh's competition.

The Commission concluded that Waugh and the Armour officials had "taken advantage of a competitive weapon, oppressive and coercive in nature", which tended unduly to suppress competition by preventing customers "from exercising their free will and judgment in determining which device is the most efficient and will best serve their needs at the lowest net cost over a period of time". (15 F.T.C., at 246, 247) The respondents had "thus injected an element in the competitive field" which was "unfair and abnormal" and tended "to reduce the efficiency and economy in the production and sales methods of competing manufac-

turers and [give] to the concern that control[led] the largest volume of freight traffic an unfair advantage that [would] more than offset the higher efficiency in the production and sales methods of competing concerns which control[led] no such traffic. . . ." (*Id.*, at 247)

1410 *Mechanical Manufacturing Co.*, 16 F.T.C. 67, was a similar case. There important employees of the large packer, Swift & Co., along with the Swift Estate and members of the Swift family, controlled Mechanical Manufacturing Co., a maker of such railroad equipment as draft gears, bumping posts, and coupler centering devices. As in the *Waugh* case, railroads were persuaded to buy Mechanical's products by promises of future Swift & Co. freight traffic and threats of withdrawal of existing traffic. When necessary, Swift shipments actually were diverted from railroads that failed to comply and to railroads that did buy from Mechanical. Again the Commission found that the Federal Trade Commission Act had been violated.[4]

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4. The problem of reciprocity in rail-traffic routing is also considered in *In the Matter of Reciprocity in Purchasing and Routing*, 188 I.C.C. 417. The Interstate Commerce Commission found the practice "burdensome" to the public transportation system in that "it succeeds only in making the handling of existing traffic more expensive." (188 I.C.C., at 433, 434) The Commission also noted the unfair and anticompetitive aspect of the practice:

> "The manufacturer of railway materials or supplies who has little traffic to offer as an inducement is at a serious disadvantage although its product may be superior and its prices comparable. The smaller carriers with limited purchasing power are likewise at a disadvantage in securing traffic although their services are prompt and efficient, and their rates on a parity with those of their larger competitors." (188 I.C.C., at 433)

In *California Packing Corp.*, 25 F.T.C. 379, as in the case before us, the practitioner of reciprocity, California Packing Corporation, was a large diversified processor and distributor of many different kinds of food products. One of its subsidiaries was Encinal Terminals, a corporation operating wharves, sheds, warehouses, and switch tracks on San Francisco Bay for the purpose of handling rail and steamship freight at the waterfront. By promising, or threatening, to shift their purchases of raw and manufactured materials, California Packing and its officers and subsidiaries placed pressure on their suppliers to divert their freight shipments from other terminal companies to Encinal. Similarly, steamship companies were coerced
1411 into diverting freight tonnage to Encinal Terminals, even when the move was uneconomical for them, by the employment of California Packing's power as an important shipper. Even California Packing's competitors were exploited by the device of soliciting their customers and suppliers to induce them to divert shipments through Encinal Terminals.

The Commission found that the "principal consideration" for California Packing's purchases from its suppliers became "the volume of tonnage routed by said industrial concerns through the said Encinal Terminals . . . instead of the usual and normal competitive considerations such as quality, service, and price. . . ." (25 F.T.C., at 398-399) The practices disclosed were held unfair methods of competition.

These decisions represent specific applications of the general principle that abuse of large buying power to restrict competitive market opportunities is illegal. As the Supreme Court has held:

> "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or

> to attempt to monopolize interstate trade or commerce. *Nor . . . may it be used to stifle competition by denying competitors less favorably situated access to the market.*" (*United States* v. *Griffith*, 334 U.S. 100, 108, emphasis added.)

This is precisely the vice of reciprocity as manifested in the cases mentioned above. It transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market". It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his product. In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and, ultimately, the allocation of resources. Obviously, this practice strikes at one of the basic premises of a free enterprise economy. And it is clear
1412 that these anticompetitive effects are likely to occur, given a corporate structure similar to that of respondent in this proceeding, without the crudities involved in the three cited cases or indeed without any action whatsoever on the part of the parent corporation. It is certainly obvious, to use an example based on the facts of this case, that a food processor who uses dehydrated onion or garlic and who seeks to curry Consolidated's business will tend to prefer Gentry as his source of supply, and the advantages accruing to him from so favoring Gentry would not have to be pointed out by Consolidated.

In many respects, reciprocal buying bears a close resemblance to the unlawful business practice of entering into tying arrangements, *i.e.*, agreements by one party to sell one product only on condition that the buyer also pur-

chase a different product. The latter product is said to be "tied" to the former.

> "Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 305, 306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. . . ." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 6.

Similarly, reciprocal buying may also enable one seller to succeed over another not on the basis of "a better product or a lower price but because of his power or leverage in another market", *viz.*, the market in which the seller is an influential buyer of other products. A frequent condition, express or implied, of his purchase of goods from his supplier is that the supplier also buy from him. The
1413 prospective customer "ties" the sale of his product to his purchases from his supplier and "competition on the merits with respect to the tied product is inevitably curbed."

It is for these reasons that the Commission held in the *Waugh Equipment, Mechanical Manufacturing,* and *California Packing* cases that coercive exercise and reliance on business reciprocity is an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. And, in view of respondent's coercion, were this a proceeding under Section 5 an order to cease and desist would be entirely justified. However, this proceeding was brought not under Section 5 but under Section 7 of the

Clayton Act, and the order issued by the hearing examiner calls not for termination of anticompetitive conduct but for divestiture of the acquired firm. We must therefore proceed to consider, in the context of Section 7, whether the merger here has brought about a change in the structure of the industry whose effect—in relation to reciprocity—may be substantially to lessen competition.

V.

It is elementary that the effect of a merger, rather than its technical label, determines its validity. An acquisition of one corporation by another need not be of an orthodox horizontal or vertical nature for Section 7 to apply. The legislative history of amended Section 7 makes it clear 1414 "that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition . . . or tending to create a monopoly." (H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 11) As the Supreme Court has recently stated, "by the deletion of the 'acquiring-acquired' language in the original text, [Congress] hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317.

The adverse effect which reciprocal buying may have upon competition has already been demonstrated. The way in which a conglomerate merger may enhance the likelihood that reciprocity may be practiced to stifle competition is equally clear.

A single-line corporation is far less likely to both buy from and sell to another corporation than one that is diversified—i.e., if it deals in a variety of product or service lines. A glance at the cases discussed in Part IV, supra,

makes this apparent. The officials of Armour & Co. and Swift & Co. could not exercise reciprocal buying power over the railroads so long as their companies produced only meat products, which the railroads did not consume. But once they established relationships with firms that produced railroad equipment, they could employ Armour and Swift power as shippers of meat products to force the railroads to buy the equipment from the sources in which they were interested. It was precisely the lack of diversification that prevented other equipment manufacturers from meeting the reciprocity competition generated by Armour and Swift. Similarly, California Packing Corp's. use of reciprocity depended upon linking the purchase of supplies and transportation for its food products to the operation of a wholly unrelated terminal business. In sum:

> "The large diversified firm has better opportunities for using reciprocal buying than the single-line producer . . . A firm that makes many products can more readily find a supplier that is also a potential buyer of what it makes. And, if it is a large purchaser, it may readily persuade its supplier to buy from it. If a mere suggestion is not adequate, a threat to withhold patronage may do the trick . . .

1415 "Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increase its sales . . .

"... The large diversified firm producing for sale to other industries has an advantage in the strategy of reciprocal dealing." (Stocking and Mueller, "Business Reciprocity and the Size of Firms", The Journal of

Business of the University of Chicago, Vol. XXX, pp. 73, 76-77 (1957))

Hence, to the extent that a diversification, or conglomerate, merger produces an industry structure that facilitates and furthers reciprocal buying, it is likely to lead to the most serious of anticompetitive consequences, *viz.*, to confer upon large, diversified corporations a crushing weapon against small, single-line competitors. The potential practical consequences are dramatically illustrated in the *Waugh* case, discussed earlier. The danger of such consequences, we must find, also exists here as a practical reality.

Consolidated's acquisition of Gentry presented it with an opportunity, previously unavailable, to reap a profit from sales in one product area, dehydrated onion and garlic, on the sheer strength of its buying power in other markets, and not on the basis of "a better product or a lower price". Furthermore, Consolidated did, again admittedly, overtly exert this power on occasion with success. The evidence shows that other established onion and garlic producers, Basic Vegetable Products, Inc., and Puccinelli Packing Co., lack Consolidated's size and diversification, and are thus ill-equipped to respond in kind. It is in the context of just such an industry structure that a reciprocal buying policy has the greatest chance of success and therefore poses the most serious threat to competition.

1416 Since Consolidated acquired the power to extort or simply attract reciprocal purchases from suppliers when it acquired Gentry, the causal relationship between the merger and the injury to competition implicit in reciprocal buying is patent. While respondent has admitted the overt exercise of the power inherent in its corporate structure, expressly conditioning purchases from processors on their purchases from Gentry, it seems clear that merely as a result of its connection with Consolidated, and

without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made.

Section 7 is the appropriate statute for dealing with the problem of eliminating anticompetitive effects directly attributable to a merger in their incipiency. Respondent's argument that the Commission should rely on Section 5 of the Federal Trade Commission Act as an exclusive remedy in this case is without merit. Congress did not consider it sufficient to provide *post hoc* procedures to enjoin anticompetitive behavior. Rather, Section 7 was designed to abort such changes in industry structure that would have anticompetitive effects, a concept that is not in any sense confined to unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act. Though neither the absence of competition between two arms of the single corporation nor intra-corporate sales might be unfair methods of competition, in a Section 7 proceeding the inquiry frequently focuses on the anticompetitive effect of anticipated business practices that would be immune from legal attack had the structure of the merged corporation been developed by growth rather than acquisition. Therefore, in this case, it might be agreed that a cease and desist order would eliminate such overt reliance on reciprocity by Consolidated as might be proved, but it would do nothing to eliminate the anticompetitive effect inherent in the corporate structure created by the merger.

VI.

Is the anticompetitive potential of the Consolidated-Gentry merger sufficiently substantial to render the merger unlawful?[5] In considering this question, we are aware that

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5. It is agreed that dehydrated onion and dehydrated garlic constitute the lines of commerce involved in this proceeding and that the relevant market area is the whole United States.

Congress did not intend Section 7 to apply only to the
1417 "mere possibility" that competition may be substantially lessened. Conversely, "A requirement of certainty and actuality of injury to competition in [sic] incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6)

> "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." (*Brown Shoe Co.* v. *United States, supra,* at p. 323)

What then are the "probabilities" here? Once again, the *Brown Shoe* opinion is illuminating. In discussing the vertical aspects of the merger between Brown Shoe Co. and G. R. Kinney Co., the Court described a spectrum of types of restraints on competition that may result, in varying degrees, in foreclosing a share of a market to competitors. It distinguished in particular between exclusive-dealing contracts and tying agreements. The former, it said, "are frequently negotiated at the behest of the customer who has chosen the particular supplier and his product upon the basis of competitive merit", and under certain circumstances "may escape censure. . . ." (370 U.S., at p. 330)

Tying agreements, on the other hand, "can rarely be harmonized with the strictures of the antitrust laws . . ." (*Ibid.*) The Court explained:

> "The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use by an established company is likely

'substantially to lessen competition' although only a relatively small amount of commerce is affected. . . ." *(Ibid.)*

As stated earlier, tying agreements and reciprocal buying are closely analogous in anticompetitive effect. In the latter, the customer is forced "to take a product or brand he does not necessarily want" in order to make a sale. That the similarity between a merger and a tying agreement is an appropriate consideration under Section 7 is also apparent from *Brown Shoe,* since the resemblance between one
1418 aspect of Brown's relationship to Kinney and a tying clause was mentioned by the Court as a consideration supporting a finding of violation. (*Id.,* at p. 337) By acquiring Gentry, Consolidated has provided itself with a basis on which to "tie" sales to its supplier to purchases from them.

Certainly the area of competition threatened by the Consolidated-Gentry merger greatly exceeds the "relatively small amount of commerce" the Court has considered necessary to invalidate a tying agreement. This is revealed by examining Gentry's sales to suppliers of Consolidated. In 1958, to cite the most recent year for which figures are available, Gentry held 35% of the market for dehydrated onion and 39% for dehydrated garlic. Its sales of each, in pounds, were 6,259,171 and 1,979,834, respectively. Respondent has undertaken to tabulate (Respondent's Proposed Findings of Fact and Conclusions of Law, pp. 99-101) Gentry's sales to major customers—defined as customers that purchased 10,000 pounds of onion and garlic from Gentry in any year from 1946 to 1958—that were also suppliers of Consolidated. For 1958, these sales came to 4,617,145 pounds of onion and 1,263,690 pounds of garlic. Translated into market shares, firms that both supplied Consolidated and bought in volume from Gentry purchased more than

25% of the onion produced by the industry and not quite 25% of the garlic.

Hence, in both the onion and garlic product lines approximately one-fourth of the available market stands to be influenced by the possibility that Consolidated will withdraw patronage unless Gentry is in turn patronized. But this is only the most conservative calculation of the potential scope of reciprocity at Consolidated's command. Certainly many other prospective purchasers from Gentry could be influenced by the expectation or promise of reciprocal purchases of their products by Consolidated. The latent force of Consolidated's buying power therefore undoubtedly exceeds one-fourth of both markets by a substantial margin. The area of prospective market foreclosure is thus not merely significant, but exceptionally large.

Because, again, Section 7 requires us to deal in "probabilities", potential foreclosure of a major share of the market weighs strongly against the lawfulness of a merger—especially a merger that threatens consequences like those of a tying agreement. But there are other factors, mentioned in *Brown Shoe* as appropriate for consideration, which point in the same direction.

1419 First, the Court indicated that past behavior of the merging firms may be significant in showing potential market foreclosure. (370 U.S., at p. 332) Here, past behavior reveals actual use of reciprocity by Consolidated in pushing Gentry's products. Respondent argues, however, that the record discloses that reciprocal buying was employed only sporadically and with limited success. We think this contention misconceives both the point of Section 7 and the significance of the reciprocity evidence of record. That respondent has not chosen to systematize and vigorously enforce its reciprocal buying policy is of far less significance than that it obtained the *power* to do

so by merger, and that by actually using its power on occasion to disadvantage competitors unfairly, respondent demonstrated that its possession of such power posed a real and substantial, and not merely abstract or theoretical, threat to competition.

Section 7 reads "may be", not "has". The evidence may show that respondent has not thus far severely impaired competition in the industry by reciprocity but it does not show that respondent may not do so when it chooses or that it will not so choose in the future. In other words, respondent's proof on this point reveals, at best, only past internal irresolution in implementing reciprocity rather than solid and effective external limitations on the power to exercise it.

Any suggestion that such power cannot effectively be exploited fails to account for clear-cut historical instances when it has been. Consider, for example, the dramatic effect of reciprocity in *Waugh Equipment Co.*, discussed earlier, where the acquired firm was enabled to leap from insignificance to control of 35% of the market and industry leadership in only six years.[6] Respondent has given us no reason to believe that industry conditions preclude its achieving similar results. Indeed, as we pointed out in part V, *supra*, the industry structure seems tailor-made to the exploitation of reciprocal buying power.

Second, the Supreme Court attached importance in *Brown Shoe* to the trend of concentration in the industry. 1420 (*Id.*, at p. 37) Here, no such trend appears, but the industry is already so highly concentrated that there

6. For other instances in which reciprocal buying by large diversified firms may seriously hamper small single-line competitors, see Stocking and Mueller, "Business Reciprocity and the Size of Firms", XXX *The Journal of Business of the University of Chicago* 73 (1957).

is hardly room in which a "trend" could develop.[7] With two firms accounting for better than 85% of both product lines for eleven successive years, maximum concentration short of monopoly has already been achieved. If it is desirable to prevent a trend toward oligopoly[8] it is *a fortiori* desirable to remove, so far as possible, obstacles to the creation of genuinely competitive conditions in an oligopolistic industry. Respondent's reciprocal buying power, obtained through acquisition of Gentry, is just such an anticompetitive obstacle.

This conclusion is buttressed by the peculiar nature of the dehydrated onion and garlic industry. In the first place, the record shows that Gentry's leading competitor, Basic Vegetable Products, Inc., has been the innovator and leader in the field. Gentry has recently made technical strides narrowing, although probably not closing, the gap between them. There is also evidence that the third firm, Puccinelli Packing Co., is not only much smaller—commanding only about 10% of each product market—but is considered by many buyers to offer an inferior product and inferior service.

Coupled with this industry structure is the fact, well-documented by respondent, that many buyers have determined that their source of supply may best be protected by a policy of buying from two suppliers. When the inducement of reciprocal buying is added as a third ingredient, the probable result becomes clear. Buyers are likely to lean toward Basic on the ground of quality, but, in seeking a second, protective supply channel, to purchase from Gen-

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7. One "trend", however, is highly possible. Other diversified food firms may follow Consolidated's lead and seek to acquire the remaining industry members for reciprocity purposes. This development would stifle fair competition on an industry-wide basis.

8. See *Brown Shoe Co.* v. *United States*, 370 U.S., at pp. 332-33.

try in the belief that this will further their sales to Consolidated. Not only does Gentry thus obtain sales that
1421 might otherwise go to Basic or Puccinelli, but the two-firm oligopoly structure of the industry is strengthened and solidified and new entry by others is discouraged.[9]

Third, and closely related to the problem of oligopoly, is the matter of maintaining competitive vigor in the industry. Respondent seems to think that it cannot be found to have violated Section 7 since it has not driven competitors from the field or sharply curtailed their sales. But we have already indicated that our inquiry must focus on *probable* effect, and that one such probable effect of respondent's acquisition of Gentry is the discouragement of new competition. This could occur even if Gentry does not drive competitors from the field or attain unilateral industry dominance. If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened whether or not Gentry can expand its market share.[10] And if, as

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9. Neither the departure from the industry of J. R. Simplot Co., nor the entry of Gilroy Foods, Inc. (later purchased by McCormick & Co.) appears particularly significant here. Simplot seems to have switched to another field for reasons extrinsic to the competitive picture in the onion and garlic industry. Gilroy's entry is too recent to permit assessment of its probable role, especially in view of its acquisition by McCormick, a large user of both onion and garlic.

10. It is for this reason that we reject respondent's argument that the decline in its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther, had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price, and service competition.

we find to be true here, the share of the market that may be insulated from the effective interplay of fair competitive forces is substantial, and the likelihood of such foreclosure is considerable, the merger cannot stand.

The Supreme Court has said that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." (*Brown Shoe Co.* v. *United States*, 1422 *supra*, at p. 333) Nor can it "immunize a merger" if pre-existing oligopoly is thereby significantly reinforced or more firmly entrenched. "Vigor" of competition is diminished, rather than increased, by a merger that adds an anticompetitive element to an already overwhelmingly concentrated industry. Of course, a merger escapes the proscription of Section 7 if its likely effect is to promote, rather than hinder, competition. This might be true, for example, if the acquired corporation were a "failing company" being purchased by a newcomer to the industry, or if two small companies must combine in order to compete effectively with larger corporations dominating the industry. (See *Brown Shoe Co.* v. *United States*, 370 U.S., at pp. 319, 331) But no such procompetitive effects can be discerned in the merger here. Indeed, it is difficult to see how the quasi-tying-agreement effect of reciprocal buying fostered by the union of Consolidated and Gentry can be anything but anticompetitive.[11]

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11. Respondent has suggested that reciprocity business gained by its acquisition of Gentry is offset by business Gentry has lost due to competitors of Consolidated not wishing to patronize one of its divisions. But this hardly establishes that the "vigor of competition" has been preserved. Instead it shows that the merger has lent additional rigidity to the market by establishing a class of customers immune to Gentry's sales efforts. The free play of competitive forces is thus further curbed.

In *Brown Shoe,* the Court concluded that the Brown-Kinney merger was likely substantially to lessen competition:

> "because the trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes, without producing any countervailing competitive, economic, or social advantages."

So here, we must conclude that the acquisition of Gentry by Consolidated has conferred upon the latter the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic, thereby jeopar-
1423A dizing the competitive opportunities of its small, relatively undiversified competitors and tending to lend further rigidity to an already heavily concentrated industry and to discourage the entry of new competitors, all "without producing any countervailing competitive, economic, or social advantages."[12]

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12. *Cf., Reynolds Metals Co.* v. *Federal Trade Commission;* (D.C. Cir., decided Sept. 27, 1962), slip opinion, p. 12:

> "Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the 'deep pocket' or 'rich parent' for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition."

VII.

The final question concerns the appropriate relief to be ordered. The hearing examiner directed respondent to divest itself within six months of all assets obtained through acquisition of Gentry, together with subsequent additions thereto, in such a manner as to restore Gentry as a going concern in the production and sale of dehydrated onion, garlic, and other products. The examiner's order would prohibit distribution of the stock or assets of Gentry to any officer, director, stockholder, employee, or agent of Consolidated. Respondent objects (a) that there is no reason to prevent a "spin-off" of Gentry to existing shareholders of Consolidated, and (b) that the six-month time limit imposes an unreasonable burden. Significantly, respondent does not argue that divestiture, in whatever form, is not here, as it normally is, the proper remedy. That proposition we take to be conclusively established by *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, which held that divestiture, "that most drastic, but most effective, of antitrust remedies," is "peculiarly appropriate in cases of stock acquisitions which violate §7." 366 U.S., at 326, 328.

1423B In this case, divestiture is indeed peculiarly appropriate. As we have pointed out, a cease and desist order would prevent further overt effort by respondent to obtain business for Gentry through reciprocity, but it could not remove the attraction, implicit in the Consolidated-Gentry relationship, which is now well-known in the industry, for suppliers or prospective suppliers of Consolidated to purchase from Gentry solely or principally in the hope of maintaining or enhancing their sales position with Consolidated.

However, we find substance in both of respondent's contentions concerning the details of the order of divestiture which should be issued. Respondent points out that its

stock is publicly held by thousands of investors. Their simultaneous ownership of Gentry and Consolidated shares is not likely to have an adverse effect on competition. An order prohibiting transfer of stock in a new, independent, reconstituted Gentry corporation to officers, directors, executive employees, and major shareholders (*e.g.*, owners of more than 2% of the stock) of Consolidated might therefore suffice. Further, a six-month deadline for divestiture of Gentry's entire business may be unnecessarily abrupt. However, on these and other aspects of the proposed order we are without adequate information at this time to determine what would be the most appropriate and effective provisions to be included.

In addition, we are of the opinion that the hearing examiner's order is, in one important respect, inadequate and incomplete. Since respondent has admittedly engaged in a practice which we have found to be an unfair method of competition, protection of the public interest requires that it be specifically ordered to desist from any future resumption of that practice. Cases such as *Waugh Equipment Co.* and *Mechanical Manufacturing Co.*, Part IV, *supra*, show that anticompetitive reciprocity relationships between firms may be established not only through a clear-cut, parent-subsidiary connection but also through ownership or control of one company by important officials of another. For this reason, no relief will be adequate unless it prohibits Consolidated and Gentry from having common officers, directors, and executive employees and precludes stock ownership in each firm by officers, directors, and executive employees of the other.

Preparation of a sound and equitable order embodying these provisions requires that the matter be explored
1424 more fully by the Commission and the parties than has yet been done here. The controversy up to now has centered on the issue of violation. Now that it has been determined that Section 7 has been violated, we believe it

would be useful and desirable to follow a procedure here analogous to that provided in Rule 4.22(c). Within twenty days after service of this decision, counsel supporting the complaint shall file with the Commission a proposed form of order appropriate to our decision, together with a supporting memorandum. Counsel for respondent may, within twenty days thereafter, file an alternative form of order, together with a supporting memorandum; and counsel supporting the complaint may, within ten days thereafter, file a statement in reply thereto. The Commission will, upon consideration of the materials submitted, enter its final order.

Commissioner Anderson dissented to the decision in this matter and Commissioner Higginbotham did not participate.

1451 [Caption Omitted]

FINAL ORDER OF THE FEDERAL TRADE COMMISSION

(Issued on March 22, 1963; served on April 1, 1963)

Pursuant to the Commission's order issued November 15, 1962, complaint counsel having filed a proposed form of order appropriate to carry out the Commission's decision, together with a supporting memorandum, and respondent having filed an alternative proposed form of order, together with supporting memorandum, and complaint counsel having filed a statement in reply thereto; and the Commission having determined that respondent's proposed form of order should be adopted with certain modifications described in the accompanying memorandum of the Commission:

I.

IT IS ORDERED that the respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, within one (1) year from the date this order becomes final, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and good will acquired by Consolidated Foods Corporation as a result of the acquisition by Consolidated Foods Corporation of the assets of Gentry, Incorporated, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Gentry, 1452 Incorporated, so acquired, in such manner as to restore it as a going concern in the production and sale of dehydrated onion and garlic and other products in which said Gentry, Incorporated, was engaged at and immediately prior to the time of said acquisition by respondent Consolidated Foods Corporation.

II.

IT IS FURTHER ORDERED that by such divestiture none of the stocks, assets, rights or privileges, tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls more than one (1) percent of the outstanding shares of common stock of Consolidated Foods Corporation, nor to anyone who is not approved as a purchaser in advance by the Federal Trade Commission.

III.

IT IS FURTHER ORDERED that if the respondent divests the assets, properties, rights and privileges, described in paragraph I of this order, to a new Gentry corporation, the stock of which is wholly owned by Consolidated Foods Corporation, and if respondent then distributes all of the stock in said wholly-owned new Gentry corporation to the stockholders of Consolidated Foods Corporation, in proportion to their holdings of Consolidated Foods Corporation stock, then paragraph II of this order shall be inapplicable, and the following paragraphs IV and V shall take force and effect in its stead.

IV.

No person who is an officer, director, or executive employee of Consolidated Foods Corporation, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Consolidated Foods Corporation, shall be an officer, director or executive employee of the new Gentry corporation, or shall own or control, directly or indirectly, any stock of the new Gentry corporation.

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V.

Any person who must sell or dispose of a stock interest in Consolidated Foods Corporation or the new Gentry corporation in order to comply with paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the new Gentry corporation is made to stockholders of Consolidated Foods Corporation.

VI.

As used in this order, the word "person" shall include all members of his immediate family.

VII.

IT IS FURTHER ORDERED that respondent, Consolidated Foods Corporation, shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a written and detailed report of its plans and progress in carrying out the provisions of this order.

By the Commission, Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

1454 [Caption Omitted]

MEMORANDUM ACCOMPANYING FINAL ORDER OF THE FEDERAL TRADE COMMISSION

(Issued on March 22, 1963)

By the Commission:

On November 15, 1962, the Commission determined that respondent had violated Section 7 of the Clayton Act, as amended (15 U.S.C. §18 (1958)), by acquiring the assets of Gentry, Incorporated. Adopting a procedure analogous to that described in Section 4.22(c) of the Commission's Rules of Practice, on the same date we entered an order providing for the submission by counsel on both sides of proposals concerning the form and substance of the final order to be entered.

There are no substantial differences in the proposed orders submitted by the parties. Both would allow respondent the alternatives of an outright sale of the business and assets of its Gentry Division or a "spin-off", whereby a new Gentry corporation would be formed and the stock in the

new corporation distributed to existing shareholders of Consolidated. Because, for the reasons stated in our opinion, either plan of divestiture would result in reestablishing Gentry as a viable competitive entity, the
1455 Commission has determined to accept this alternative form of order of divestiture, and thus afford respondent a degree of flexibility in formulating a plan to divest itself of the illegally acquired assets.

The differences in the orders submitted by complaint counsel and counsel for the respondent are confined to the details of divestiture. The Commission has decided to adopt the form of order submitted by counsel for the respondent with certain modifications discussed below.

The order submitted by complaint counsel would allow respondent one year after the effective date of the order in which to complete divestiture. Counsel for respondent argue that this period should be extended to two years in order to allow respondent sufficient time for deciding which method of divestiture is most appropriate, in light of Consolidated's financial position at the time the order becomes effective, the trend of Gentry's sales and profits and the relevant tax considerations. It is pointed out that Consolidated may wish to assess the possibility of an outright sale by approaching and negotiating with possible purchasers before resorting to a spin-off. Additionally, respondent notes that considerable time will be required to implement whichever plan is adopted.

On the basis of the facts now before the Commission, it is not clear that respondent will not be able to complete the necessary actions within one year. Accordingly, our order will require divestiture within one year after the date upon which it becomes effective. If divestiture should not be accomplished within that time, the Commission will then take such further action as may be necessary to effectuate the objectives of the order.

Respondent also contends that it cannot reasonably comply with a provision requiring submission within sixty days after the order becomes final of a plan for carrying out the provisions of this order. While it is certainly true that respondent cannot be expected to have completed plans for divestiture within that period, it is essential that respondent keep the Commission informed of its progress towards compliance at periodic intervals. The order 1456 will therefore require respondent to file such a progress report within sixty days after its effective date and periodically, every ninety days thereafter, until divestiture is finally effected.

It is agreed that, whether Gentry is sold or spun-off, certain limitations must be placed on the persons acquiring control of a divested Gentry so that separation will be real in fact as well as in form. It is agreed that no officer, director, employee or agent of respondent should be among the purchasers of Gentry in the event of a sale and that no officer, director or executive employee of respondent should be among the officers or shareholders of a new Gentry corporation in the event of a spin-off. There is some disagreement concerning the limitations that should be placed on respondent's shareholders.

In the case of an outright sale, complaint counsel would absolutely prohibit sale to any shareholder, no matter how small his holding. Respondent recommends that sale be permitted to a shareholder owning not more than two percent of its stock. The Commission does not believe that the absolute prohibition recommended by complaint counsel is necessary to insure complete separation and independence of Gentry from respondent. However, since an owner of two percent of respondent's stock would have an investment in the company of several million dollars and would undoubtedly be one of its largest and most influential stockholders, we are not inclined to accept respondent's alternative.

Rather, we will prohibit sale of the Gentry Division in whole or in part to a holder of more than one percent of respondent's stock. In addition, we have added a provision prohibiting sale to any purchaser who is not approved in advance by the Commission. We have done so to insure that the purpose of the order of divestiture is not defeated by sale to a purchaser whose relationship to Gentry may also tend to lessen competition in the dehydrated onion and garlic industries.

In the event of a spin-off, complaint counsel would prohibit any of respondent's shareholders to serve as an officer, director or executive employee in the new Gentry corporation, but would allow stockholding in that corporation by persons owning no more than two percent of respondent's stock. Respondent recommends that the two-percent limit apply to both situations. Again, the Commission does not believe an absolute prohibition is necessary. We have, consequently, accepted respondent's proposal of allowing small holders of its stock to assume office in a new Gentry
1457 corporation as well as hold stock in that corporation but we have, for the reasons stated above, applied the exemption only to persons holding no more than one percent of respondent's stock.

The parties disagree as to whether a purchaser of the Gentry Division must be free of any of the proscribed relationships to respondent at the time of the sale or whether the order should merely require that any such relationship be severed within six months after the divestiture. The Commission has concluded that in the event of a sale of respondent's Gentry Division it is in the public interest for the separation of Gentry from Consolidated to be complete at the time of divestiture, rather than to permit joint management for any period thereafter. We have left undisturbed, however, the proposed provision which, in the event of a spin-off, allows holders of more than the allowable

limit (one percent) of respondent's stock six months in which to reduce their holdings below that level or disassociate themselves from the new Gentry corporation.

In all other respects respondent's proposed order is accepted and, with the modifications indicated in this opinion, will be adopted as the final order of the Commission.

Commissioner Higginbotham did not participate in the decision of this matter.

[Caption Omitted]

PETITION FOR REVIEW OF FINAL ORDER OF THE FEDERAL TRADE COMMISSION

(Filed on May 29, 1963)

To the Judges of the United States Court of Appeals for the Seventh Circuit:

Consolidated Foods Corporation respectfully petitions the United States Court of Appeals for the Seventh Circuit for review of a Final Order of the Federal Trade Commission, and in support thereof states as follows:

I.

NATURE OF THE PROCEEDINGS

The Complaint

On December 18, 1957 the Federal Trade Commission issued a complaint charging that petitioner, Consolidated Foods Corporation (herein called "Consolidated"), had violated Section 7 of the Clayton Act (15 U.S.C. § 18) by acquiring the business and assets of Gentry, Inc. on April 12, 1951. It was alleged, in the words of Section 7, that:

> "The effect of the aforesaid acquisition by Consolidated of Gentry may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce, as 'commerce' is defined in the Clayton Act, in which Gentry was engaged and in which Consolidated's Gentry Division is now engaged."

The basis of the alleged violation was explained by the more specific charge that the acquisition of Gentry by Consolidated, which operates wholesale and retail grocery units, enabled Consolidated to utilize its purchasing power so as to persuade or coerce its suppliers, which were food processors, to buy their requirements of dried food season-

ings (dehydrated onion and garlic) from Gentry, which produced these products. In other words, the utilization of reciprocity power provided the basis for the complaint. Competition would be lessened, the argument ran, because food processors desirous of selling their products to Consolidated's wholesale and retail outlets could be forced or induced to buy their needs of dehydrated onion and garlic from Gentry, to the detriment of Gentry's competitors.

Motions To Dismiss the Complaint

Prior to the reception of evidence and again at the conclusion of the government's case, Consolidated filed motions to dismiss the complaint. In each instance, the motion was denied and, on appeal, the decision of the Hearing Examiner was upheld by the Commission.

Hearing Examiner's Initial Decision

Hearings, in which each side presented its evidence, were held in Chicago, Illinois; Los Angeles, California; San Francisco, California; New York City, New York and Washington, D. C. On December 29, 1961, after the completion of the hearings, the Hearing Examiner filed an Initial Decision, attached to this petition as Exhibit A.

The Hearing Examiner concluded that the acquisition of Gentry by Consolidated violated Section 7 of the Clayton Act and he ordered Consolidated to "divest itself absolutely" of the Gentry Division.

Review by the Commission

Consolidated appealed to the Commission. After briefing and oral argument, the Commission issued its opinion, attached to this petition as Exhibit B. Of the 22 findings of fact made by the Hearing Examiner, the Commission

adopted only the first 12. The other findings of fact upon which the conclusions were based were made by the Commission itself and set forth in its opinion.

The Commission concluded that "the effect of the acquisition of Gentry, Incorporated, by Consolidated Foods Corporation may be substantially to lessen competition in the domestic production and sale of dehydrated onion and garlic in violation of Section 7 of the Clayton Act, as amended."

Final Order of Divestiture

At the Commission's request, Consolidated and counsel for the government submitted proposed divestiture orders and memoranda in support thereof. On March 22, 1963, the Commission issued a Final Order requiring divestiture, attached to this petition as Exhibit C.

This order was served on Consolidated on April 1, 1963.

II.

JURISDICTION AND VENUE

This Court has jurisdiction under the provisions of Section 11(c) of the Clayton Act (15 U.S.C. § 21(c)), which provides that any person found by the Commission to be in violation of the Clayton Act may obtain a review of the Commission's order "in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business."

Venue is based on the fact that Consolidated has its office and principal place of business in Chicago, Illinois, and therefore resides and carries on business within the Seventh Federal Judicial Circuit.

III.

GROUNDS ON WHICH RELIEF IS SOUGHT

Unique Nature of This Case

Traditionally, Section 7 of the Clayton Act has been applied to two types of mergers: "Horizontal" (acquisition of a competitor) and "vertical" (acquisition of a supplier or customer). The acquisition of Gentry by Consolidated fits neither of these categories. Consolidated did not compete with Gentry; neither was it a customer or supplier of Gentry to any material extent. The acquisition was referred to by the Commission as a "conglomerate" or "diversification" merger. This is the first case attacking such a merger under Section 7 to be considered by any United States Court of Appeals.

Errors in the Commission Decision

The decision of the Commission should be set aside for the following reasons:

1. The evidence, based on a decade of post-acquisition experience, conclusively establishes that:

(a) Reciprocal buying power has not in the past created and cannot in the future create a protected market of any consequence for Gentry. While reciprocity may have produced a small amount of business for Gentry since 1951, this has not been sufficient to produce any substantial lessening of competition and there is no basis for concluding that reciprocity will be any more effective in the future than it has been in the decade covered by the record in this case.

(b) Gentry has not become and does not threaten to become the dominant producer of dehydrated onion and garlic. Since 1951, there has been intensive competition in price, quality and service in the dehydrated onion

and garlic industry. The vigor of competition in this industry has increased substantially since 1951, and the market structure is such that this competition will continue in the future.

2. The Commission, conceding that reciprocity has not since 1951 produced a substantial lessening of competition, based its conclusion that the acquisition violated Section 7 on the prophecy that reciprocity poses a serious threat to competition in the future. The Commission's key findings and conclusions which are based primarily on conjecture and are not supported by substantial evidence are as follows:

(a) The reciprocal buying power of Consolidated will in the future provide Gentry with a protected market which competitors cannot penetrate despite superiority of price, quality or service.

(b) Consolidated has the opportunity to profit by sales made in one market (dehydrated onion and garlic) on the sheer strength of its buying power in other markets and not on the basis of the price or quality of its products.

(c) Gentry's competitors will be foreclosed by exercise of Consolidated's reciprocity power from having the opportunity to sell to Consolidated's suppliers.

(d) Regardless of overt action on the part of Consolidated, the existence of the Gentry-Consolidated relationship will induce a substantial number of food suppliers desirous of doing business with Consolidated to purchase their requirements of dehydrated onion and garlic from Gentry.

(e) The oligopolistic structure of the dehydrated onion and garlic market, coupled with the fact that many users of dehydrated onion and garlic have a policy of buying from two suppliers, makes it probable that the existence of the Consolidated-Gentry relation-

ship will be the key factor inducing buyers to utilize Gentry as their second source of supply.

(f) A probable effect of Consolidated's acquisition of Gentry will be the discouragement of new competition.

(g) A probable effect of the merger will be to diminish the vigor of competition because a pre-existing oligopoly structure has been reinforced by reciprocal buying power.

(h) Divestiture is the only appropriate remedy to cure the violation of Section 7 resulting from the acquisition of Gentry by Consolidated.

3. There is no substantial evidence to support the conclusion that the effect of the acquisition of Gentry by Consolidated "may be substantially to lessen competition in the domestic production and sale of dehydrated onion and garlic in violation of Section 7 of the Clayton Act, as amended." Since the conclusion is not supported by substantial evidence, the decision of the Commission is erroneous as a matter of law.

4. Even if exercise of reciprocal buying power were established by substantial evidence, the appropriate remedy would be a cease and desist order. The Commission's order of divestiture is, therefore, unwarranted and an abuse of administrative discretion.

IV.

RELIEF PRAYED

Consolidated prays that the Commission's Final Order be set aside on the basis that the findings of fact are not supported by substantial evidence and the conclusions of law are erroneous.

Alternatively, if the exercise of reciprocal purchasing power is found to have an anticompetitive effect, Consolidated prays that the Commission's order be modified and limited to a direction that Consolidated cease and desist from the use of such power.